2754 United States Circuit Court, Southern District of Iowa.

I, Edward R. Mason, Clerk of said Court for said District, do hereby certify that the foregoing is a full, true and complete copy of the Complainant's Testimony, filed September 17, 1906, also full, true and complete copy of Complainant's Exhibits "A", "B", "C", "D" "E" and "F", in the case of the Des Moines City Railway Company, Complainant, *vs.* the City of Des Moines, Defendant, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in the City of Des Moines in said District, this 20th day of November, A. D., 1907.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
*Clerk U. S. Circuit Court, Southern District of Iowa.*

2754½ File No. 20,840. Supreme Court of the United States, October Term, 1907. Term No. 437. City of Des Moines, Appellant, *vs.* Des Moines City Railway Co. Stipulation of counsel and addition to record. Filed November 25th, 1907. (20,840.)

2755 In the United States Supreme Court, October Term, A. D. 1907. In Equity.

DES MOINES CITY RAILWAY CO., Complainant and Appellee,
*versus*
CITY OF DES MOINES, Defendant and Appellant.

Appeal from United States Circuit Court, Southern District of Iowa.

Hon. Smith McPherson, District Judge.

N. T. Guernsey, W. L. Read and Geo. H. Carr. For Appellee.
Wm. H. Brenner, Howard J. Clark and Wm. H. Baily. For Appellant.

*Appellant's Statement of Errors Relied on and Designation of Parts of Record to be Printed.*

Counsel for Appellee acknowledge receipt of a copy of within statement this 20 day of Nov'r, 1907.

N. T. GUERNSEY,
GEO. H. CARR,
W. L. READ,
*Solicitors for Appellee.*

2756 To Hon. James H. McKenney, Clerk of United States Supreme Court:

The City of Des Moines, Appellant above named, hereby submits the following statements in accordance with Paragraph 9 of Rule 10 of the Rules of the Supreme Court.

*Statement of Errors Relied on.*

The appellant asserts and intends to rely on each and all the errors contained and set forth in the assignment of errors filed in this cause and numbered 1 to 50 both inclusive as follows:

1st. That the Circuit Court erred in finding the equities of this cause to be with the complainant.

2nd. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the "Construction and Operation of Certain Street Railroads in and "along the streets of the City of Des Moines," and the amendments thereto, constitute a valid and subsisting contract between complainant and respondent.

3rd. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the "Construction and Operation of Certain Street Railroads in and "along the Streets of the City of Des Moines," and set out as Exhibit "A" in complainant's complaint, and the amendments thereto, constitute a valid and subsisting contract between the complainant and respondent.

4th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the "Construction and Operation of Certain Street Railroads in and "along the Streets of the City of Des Moines," and the amendments thereto, have been ratified and confirmed by the City of Des Moines.

2757 5th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Au- "thorizing the Construction and Operation of Certain Street Rail- "roads in and along the Streets of the City of Des Moines," set out as Exhibit "A" in complainant's complaint, together with the amendments thereto, has for years been construed by the respondent, the City of Des Moines, as granting a perpetual franchise to the complainant.

6th. That the Circuit Court erred in holding that the respondent municipality, City of Des Moines, Could, by acts or conduct on the part of its officers, in relation to or in connection with the ordinance of December 10, 1866, grant rights by such acts or conduct in addition to the rights expressly set forth in said ordinance of December 10, 1866.

7th. That the Circuit Court erred in holding that the complainant, the Des Moines City Railway Company, could obtain rights or grants not expressly granted in the ordinance of December 10, 1866, by the acts or conduct of the officers of the respondent municipality, the City of Des Moines, in connection with or in relation to said ordinance of December 10, 1866.

8th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Con- "struction and Operation of Certain Street Railroads in and along "the Streets of the City of Des Moines," together with the amend-

ments thereto, has for years been construed as one granting a perpetual franchise.

9th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, has been construed or otherwise treated by the respondent municipality, the City of Des Moines, or its officers, as in force or of any validity after the 1st day of January, 1898.

2758 10th. That the Circuit Court erred in holding that the ordinance of December 10, 1865, entitled, "An Ordinance "Authorizing the Construction and Operation of Certain Street Rail-"roads in and along the Streets of the City of Des Moines," together with the amendments thereto, creates or constitutes a perpetual grant or contract between complainant and respondent.

11th. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1865, entitled, "An ordinance Authorizing the Con-"struction and Operation of Certain Street Railroads in and along "the Streets of the City of Des Moines," together with the amendments thereto, still exist or are still in force.

12th. That the circuit Court erred in holding and decreeing that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An Ordinance Authoriz-"ing the Construction and Operation of Certain Street Railroads in "and along the Streets of the City of Des Moines," except as to the exclusive features recited in Section 10 of said ordinance, together with the amendments thereto, are perpetual in the complainant, its successors and assigns.

13th. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant, or any of them, under the ordinance of December 10, 1865, as subsequently amended or modified, exist or were in force or effect after January 1, 1898.

14th. That the Circuit Court erred in holding that the rights, or any of them, vested in the complainant as assignee of the grantee in said ordinance, as subsequently amended or modified, are perpetual or were in force or existence after January 1, 1898.

15th. That the Circuit Court erred in holding that the 2759 rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An Ordinance Au-"thorizing the Construction and Operation of Certain Street Rail-"roads in and along the Streets of the City of Des Moines," as subsequently amended or modified, are impaired by the resolution of November 21, 1905, which said resolution is complained of.

16th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violated or impaired any right or rights of complainant.

17th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Section 10 of Article I of the Constitution.

18th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Article 14 of the Amendments to the Constitution of the United States.

19th. That the Circuit Court erred in holding that the enforcement and execution of the resolution of November 21, 1905, (which resolution is complained of,) by the respondent in this case, deprives the complainant of its property without due process of law, in violation of Article 14 of the Amendments to the Constitution of the United States.

20th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, was in violation of the *bo*ligation of any contract existing between the complainant and the respondent, and especially in holding that the same was in violation of the ordinance of December 10, 1866, as subsequently amended and modified.

2760 21st. That the Circuit Court erred in ordering, adjudging and decreeing that the resolution complained of, of November 21, 1905, as set out and contained in Paragraph 32 of complainant's bill, be cancelled, annulled, set aside, and held for naught.

22nd. That the Circuit Court erred in granting an injunction restraining the respondent and its officers from enforcing and executing, or attempting to enforce and execute the resolution of November 21, 1905, set out in Paragraph 32 of complainant's bill of complaint.

23rd. That the Circuit Court erred in granting an injunction restraining respondent and its officers from dist*ro*bing, impeding or interfering with the complainant in the enjoyment of the rights and privileges claimed by it under the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Opera-" tion of Certain Street Railroads in and along the Streets of the City " of Des Moines," as subsequently amended and modified.

24th. That the Circuit Court erred in granting an injunction, and ordering, adjudging and decreeing that the respondent, the City of Des Moines, its City Council and Mayor and City Solicitor, and all officers of said city and those hereafter officers of said city, and each and all of them now holding office in said city, and all servants agents and employés, and all their successors in office, be enjoined from, in any manner, disturbing, impeding or interfering with the free use and comfortable enjoyment by said Des Moines City Railway Company, its successors or assigns, of any rights, privileges and franchises vested in complainant, and vested in any corporation or company or person from whom complainant, by purchase or otherwise, has acquired rights.

2761 25th. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, and all amendments thereto, save and except the exclusive feature of Section 10 thereof, shall be perpetual to the complainant, its successors and assigns.

26th. That the Circuit Court erred in granting an injunction, and adjudging and decreeing that the City of Des Moines and its officers, including the City Solicitor, be enjoined from bringing or maintaining an action or actions in court to ascertain and determine the respective rights of complainant and respondent.

27th. That the Circuit Court erred in ordering and decreeing that the respondent and its officers be enjoined from bringing or main-

taining an action or actions in court to oust complainant from the streets, alleys and public places of the respondent municipality.

28th. That the Circuit Court erred in ordering, decreeing and enjoining the respondent and its officers from bringing or maintaining an action or actions in court to test the rights of complainant to operate street railways in the respondent municipality, the City of Des Moines.

29th. That the Circuit Court erred in ordering, decreeing and enjoining the respondent and its officers from bringing or maintaining an action or actions in court to ascertain and determine the rights of complainant to hold or exercise the franchise claimed by it.

30th. That the Circuit Court erred in not defining what rights, privileges and franchises were vested in the complainant under the various ordinances and franchises upon which it based its right to recover in this suit.

2762 31st. That the Circuit Court erred in ordering and decreeing that the respondent and its officers and agents and their successors in office, be enjoined from interfering with the free use and comfortable enjoyment of the complainant, its successors and assigns, of the rights, privileges and franchises vested in complainant, including the ordinance of December 10, 1866, as subsequently amended and modified, without finding, adjudging and decreeing what rights the complainant had, and what rights existed under the ordinances and franchises as set out in the complainant's bill of complaint.

32nd. That the Circuit Court erred in not holding that the rights and privileges acquired and owned by the Des Moines City Railway under the ordinance of December 10, 1866, as subsequently amended and modified, expired on January 1, 1898.

33rd. That the Circuit Court erred in holding, adjudging and decreeing that the resolution of the City Council of the respondent city passed on November 21, 1905, and set out in Paragraph 32 of complainant's bill of complaint, was a law.

34th. That the Circuit Court erred in holding that the City of Des Moines had the power or authority vested in it to grant a perpetual right or franchise to construct, operate or maintain a street railway in and over the streets, alleys and public places in the City of Des Moines in perpetuity.

35th. That the Circuit Court erred in holding that the respondent, the City of Des Moines, was vested with the power or authority to grant a right or franchise to construct, maintain and operate a street railway over or upon the streets, alleys and public places of the City of Des Moines.

36th. That the Circuit Court erred in holding that the respondent, the City of Des Moines, had the power or authority on December 10, 1866, to grant a perpetual right to construct, maintain or 2763 operate a street railway upon, over or along the streets, alleys and public places of the City of Des Moines.

37th. That the Circuit Court erred in holding that the City of Des Moines was, at any time after December 10, 1866, granted or given the power or authority to grant or pass a franchise or ordi-

nance or make a contract granting or vesting in any person, firm or corporation the right or privilege to construct, maintain or operate a street railway over, upon or along the streets, alleys and public places in the City of Des Moines, in perpetuity.

38th. That the Circuit Court erred in holding that the City of Des Moines at any time ever granted, ratified or confirmed any grant in perpetuity, to construct, maintain or operate a street railway over, along or upon the streets, alleys and public places of the City of Des Moines.

39th. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right to construct, maintain or operate street railways upon, along or over the streets, alleys and public places of the City of Des Moines under the ordinance of December 10, 1866, as subsequently amended and modified.

40th. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right and privilege, granted to it by ordinance or otherwise, to construct, maintain or operate street railways upon, over or along the streets, alleys and public places in the City of Des Moines.

41st. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, as subsequently amended and modified, was a valid, subsisting contract between the complainant and the respondent, and that thereunder, the complainant had the right to construct, maintain and operate street railways over, along or upon the streets, alleys, and public places of the City of Des Moines, which said right exists in perpetuity.

2764 42nd. That the Circuit Court erred in refusing to determine the rights of complainant under each of the ordinances or franchises declared on in its bill of complaint.

43rd. That the Circuit Court erred in refusing to determine all of the questions at issue as tendered by the allegations of the bill of complaint and the allegations of the respondent's answer.

44th. That the Circuit Court erred in holding that "the Des "Moines City Railway Company has also succeeded to the rights and "benefits of divers other ordinances granted by the City of Des "Moines to divers other corporations, or persons, which said several "other ordinances are referred to in the bill of complaint of com- "plainant."

45th. That the Circuit Court erred in holding that "the Des "Moines City Railway Company has also succeeded to the rights and "benefits of divers other ordinances granted by the City of Des "Moines to divers other corporations, which said several other "ordinances are referred to in the bill of complaint of complainant "company," without also stating and finding what other corporations and what other ordinances are intended or referred to, and without fixing and determining the rights of the parties under each of said ordinances and franchises.

46th. That the Circuit Court erred in enjoining respondent and its officers from disturbing, impeding or interfering with the use and enjoyment by complainant of rights, privileges or franchises

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other than those acquired or held under the ordinance of December 10, 1866, together with the amendments thereto.

47th. That the Circuit Court erred in enjoining respondent and its officers from disturbing, impeding and interfering with the use and enjoyment by complainant of rights, privileges or franchises under ordinances respecting which controversies existing or hereafter arising are said not to be adjudicated.

2765 48th. That the Circuit Court erred in holding that all of complainant's street railways were constructed or operated under authority of the ordinance of December 10, 1866.

49th. That the Circuit Court erred in holding that the resolution of November 21, 1905, is a law or legislative act.

50th. That the Circuit Court erred in holding that the resolution of November 21, 1905, was an attempt to repeal, amend or modify the ordinance of December 10, 1866, as subsequently amended or modified.

*Designation of the Record to be Printed.*

The appellant designates the following parts of the record which it deems necessary for the consideration of the errors relied on.

*Print:* Pleadings, files etc. as follows:

| | |
|---|---|
| Bill of complaint and exhibit attached.... | Filed Nov. 27, 1905. |
| Ans. of Defendant..... | " Jan. 1, 1906. |
| Replication ..... | " Jan. 1, 1906. |
| Præcipe for Appearance..... | " Aug. 14, 1906. |
| Amendment to Answer..... | " Dec. 3, 1906. |
| Opinion ..... | " Feb. 20, 1907. |
| Order directing decree for Complainant.... | " Feb. 20, 1907. |
| Final Decree..... | " Mar. 30, 1907. |
| Petition for Appeal..... | " July 9, 1907. |
| Order allowing Appeal..... | " July 9, 1907. |
| Assignment of Errors..... | " July 10, 1907. |
| Citation on Appeal and Return..... | " Aug., 1907. |

*Omit:* Pleadings and files not so designated.

2766 *The Evidence.*

*Print:* All the evidence in the record including testimony and exhibits except those parts hereinafter requested to be omitted.

*Omit:* All captions and certificates by examiners and all notices stipulations and commissions to take testimony and the interrogatories attached thereto. Also all certificates authenticating copies of records offered in evidence.

*Omit:* All maps and plats offered by either party.

Deposition of N. W. Harris, filed June 25, 1906.

*Print:* Questions and answers.

*Omit:* Caption and certificate by notary and stipulation and interrogatories, also omit all exhibits attached.

Deposition of R. N. Bayliss, filed June 14, 1906.

*Print:* Questions and answers.

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*Omit:* Caption and certificate by notary and stipulation and interrogatories.

Complainant's evidence filed Sept. 17, 1906.

*Print:* The whole except as otherwise noted.

*Print:* Exhibit 1. Omitting certificate of Secretary of State.

*Omit:* Exhibits 2 to 11. Articles of Incorporation.

*Print:* Exhibits 12 to 27 omitting certificates of City Clerk.

*Print:* Exhibits 28 to 29, omitting acknowledgments and certificates of Recorder.

*Print:* Exhibits 30 to 43 omitting certificate- of City Clerk.

*Print:* Exhibits 44 and 45.

*Print:* Exhibits 46 to 52, omitting certificates of City Clerk.

*Omit:* Exhibit 53.

*Print:* Exhibits 54 to 64, omitting certificates of City Clerk.

*Print:* Exhibits 65 to 66, omitting acknowledgments and certificates of Recorder.

2767 *Print:* 67, omitting affidavit and exhibits A, B, C, and certificate attached.

*Print:* Exhibit 68.

*Print:* Exhibits 69 to 88, omitting certificates of City Clerk.

*Print:* Exhibits 89 and 90, omitting acknowledgments and certificates of Recorder.

*Print:* Exhibits 91 to 94, omitting certificates of City Clerk.

*Print:* Exhibit 95, omitting acknowledgment and certificate of Recorder.

*Print:* Exhibits 96 to 99, omitting certificates of City Clerk.

*Omit:* Certificates of Judge and Clerk of District Court.

*Print:* Exhibits 100 to 103, omitting certificates of City Clerk.

*Print:* Exhibit 104.

*Print:* Exhibits 105 to 118, omitting certificates of City Clerk.

*Print:* Exhibit 119, omitting acknowledgment and certificate of Recorder.

*Print:* Exhibit- 120 to 122, omitting certificates of City Clerk.

*Print:* Exhibit- 123 to 125, omitting acknowledgment and certificate of Recorder.

*Print:* Exhibit- 126 to 133, omitting certificates of City Clerk.

*Print:* Exhibit 134, omitting acknowledgment and Recorder's certificate.

*Print:* Exhibits 135 to 137, omitting certificates of City Clerk.

*Print:* Exhibits 138 to 142, omitting acknowledgment and certificate of Recorder.

*Print:* Exhibit 143, omitting certificates of City Clerk.

*Print:* Exhibit 144, omitting acknowledgment and certificate of Recorder.

*Print:* Exhibits 145 to 175, omitting certificates of City Clerk.

*Print:* Exhibit 176, omitting Auditor's certificate.

*Print:* Exhibit 177 to 223, omitting certificate of City Clerk.

2768 *Print:* Parts of Exhibit 224 (Revised Ordinances of 1900) as follows:

Title Page.

Pages 3, 4, and 5.
Pages 8, 9, 10, and 11.
Pages 45,-46 ordinances describing boundaries.
Pages 49-50 Secs. 31, 34, 35, 36, 37.
Pages 427 to 480.
*Omit:* All parts of Exhibit 224 not above indicated.
*Omit:* Exhibit 225 (Trust Deed).
*Print:* Exhibits 226 to 228, omitting certificates of City Clerk.
*Print:* Exhibit- 229 to 230, omitting Clerk's certificate.
*Omit:* Certificates of Judge and Clerk of District Court.
Respondent's evidence filed September 17, 1906.
Print the whole except as otherwise noted.
*Omit:* Part quoted from pages 9, 10, 11 Revised Ordinances of 1900.
*Omit:* Sec. 17 and 18 Revised Ordinances of 1900 quoted.
*Omit:* Opinion in State *vs.* West, 96 Iowa, 521, quoted.
*Omit:* Opinion in McCain *vs.* City of Des Moines, 103 N. W. Rep., 979, quoted.
*Omit:* Secs. 31 to 37 Revised Ordinances of 1900, quoted.
*Print:* Testimony of W. H. Bremner and Exhibits B, C, D, as quoted.
*Print:* Complainant's exhibits 225 and 226 as quoted.
*Omit:* Exhibits A, B, C, and D attached and complainant's exhibits 225 and 226 attached.
Respondent's evidence filed November 16, 1906.
Print the whole except as otherwise noted.
*Print:* Testimony of J. W. Budd.
*Omit:* Exhibits J and K.
*Print:* Testimony of Robert Fullerton.
*Omit:* Plats attached.

CITY OF DES MOINES, *Appellant,*
By W. H. BREMNER,
*Its Solicitor and Counsel.*

[Endorsed:] 437, 20840. 437.

2769 [Endorsed:] File No. 20,840. Supreme Court U. S. October Term, 1907. Term No. 437. City of Des Moines, Appellant, *vs.* Des Moines City R'y Co. Statement of errors relied on and designation by counsel for appellant of parts of record to be printed and omitted and proof of service of same. Filed Nov. 23d, 1907.

2770 In the Supreme Court of the United States, October Term, A. D. 1907.

CITY OF DES MOINES, Appellant.
*vs.*
DES MOINES CITY RAILWAY COMPANY, Appellee.

Appeal from the United States Circuit Court, Southern District of Iowa.

The appellee, The Des Moines City Railway Company, pursuant to the provisions of section 9, rule 10 of the rules of the above named court now designates in writing, the additional parts of the record which it thinks material, the parts of the record so designated herein being in addition to the portions of the record designated for printing by the appellant.

*Pleadings, Files, Etc.*

In addition to the portions of the rest of the record designated by the appellee, print the following:

1. Motion for leave to amend answer, including the affidavit of W. H. Bremner in support thereof, filed November 16, 1906.

2. Resistance to the said motion for leave to amend, filed by the appellee, November 21, 1906.

*The Evidence.*

Print all captions (except in each instance the title of cause, name of the court and appearances of counsel) and all examiner's certificates, referring to, included in or attached to the complainant's testimony or any part thereof.

2771 Print all maps and plats, constituting a part of the complainant's testimony, including the maps and plats, marked exhibits "A," "B," "C," "D," "E" and "F," and referred to in the evidence of F. C. Tate and George B. Hippee.

*Deposition of N. W. Harris.*

Print the following portion of exhibit "A" of said deposition: "This indenture, made and entered into this first day of October, in the year one thousand eight hundred and eighty-nine, by and between the Des Moines Street Railroad Company, a corporation duly organized and existing under the laws of the State of Iowa, party of the first part, and The American Trust and Savings Bank, of the City of Chicago, Cook County, and State of Illinois, Trustee, a corporation duly organized and existing under the laws of the State of Illinois, party of the second part, witnesseth: * * *

Now therefore, for and in consideration of the premises and of the sum of one dollar cash in hand, paid to the said first party by the said second party before the sealing and delivery hereof, the

receipt whereof is hereby acknowledged, and in order to secure the payment of said bonds and coupons according to their tenor, the said first party has granted, bargained, sold, and conveyed, and does by these presents grant, bargain, sell, convey, mortgage and warrant to the said second party, as Trustee, and its successors, all the following described real estate, in the County of Polk and State of Iowa, to-wit: * * *

* * * together with all of its real estate, railroad tracks, personal property, franchises, rights, privileges, and appurtenances belonging or in any way appertaining to the party of the first part, and also all real estate, railroad tracks and personal property, franchises, rights, privileges, and appurtenances it may hereafter acquire, whether legal or equitable, including all rights, powers, privileges and franchises granted to or conferred upon the said
2772 first party by the State of Iowa and the Cities of Des Moines, North Des Moines, Capitol Park, University Place, Sevastopol, and other towns adjacent to said City of Des Moines, or which may be hereafter so granted and conferred. * * *

Filed for record October 1st, A. D. 1889, Recorded in book 233, page 72."

Print the following portion of exhibit "B" to the deposition of N. W. Harris.

"Circular No. 503. First mortgage six per cent. refunding and improvement bonds of the Des Moines Street Railroad Company of Des Moines, Iowa, dated October 1, 1889. * * *

With the occupation of all the important streets and territory of the city for nearly ten years to come, the Des Moines Street Railroad Company is in an unusually strong position and with full possession of the ground has practically an exclusive as well as a perpetual franchise."

Print the following portion of exhibit "C" to the deposition of N. W. Harris:

"This indenture, made and entered into by and between Des Moines City Railway Company, a corporation duly organized and existing under the laws of the State of Iowa (hereinafter called "Railway Company"), party of the first part, and the Illinois Trust and Savings Bank, Trustee, a corporation duly organized and existing under the laws of the State of Illinois (hereinafter referred to as "Trustee"), party of the second part, witnesseth: * * *

Now, Therefore, the party of the first part hereto, in consideration of the sum of one dollar paid by the said Trustee, receipt whereof is hereby acknowledged, and in order to secure the due and punctual payment of said several bonds and of the interest thereon, has granted, bargained, sold, transferred, assigned and conveyed, and does by these presents, give, grant, bargain, sell, transfer, assign and convey unto the party of the second part hereto, Trustee
2773 as herein provided, and its successors in trust with full power of succession to and enjoyment of the franchises of the party of the first part, all the following described real estate situate in the County of Polk, and State of Iowa, to-wit: * * *

Also all and singular the lines of railway and street railway of

the party of the first part hereto, also all buildings, road beds, rights of way, cars, tracks, machinery, street railway plants, engines, boilers, dynamos, electrical machines, electric motors, and other electrical apparatus, rolling stock, poles, lines and rails, and rights, liberties, leases, privileges and franchises, and all property of every kind and wherever situated, now belonging to the party of the first part hereto, as well as all rights and property of all kinds whatsoever, hereafter acquired by the party of the first part hereto: * * *

Filed for record August 5, 1893. Recorded in book 286, page 318."

Print the following portion of exhibit "D" to the deposition of N. W. Harris:

"Circular No. 690. $20,000 consolidated first mortgage six per cent. gold bonds of the Des Moines City Railway Company, controlling the entire street railway system in the City of Des Moines, Iowa, * * *

The legality of these bonds, and all proceedings incident to their issue, including franchise rights, etc., have been passed on and approved by our counsel, a copy of whose opinion will be furnished with bonds, if desired."

Print the following portion of exhibit "E" to the deposition of N. W. Harris:—

"Circular No. 722. $24,000 consolidated first mortgage six per cent. gold bonds of the Des Moines City Railway Company. * * *

The franchise rights of the company are very favorable
2774 and are practically perpetual. * * *

The legality of these bonds, and all proceedings incident to their issue, including franchise rights, etc., have been passed on and approved by our counsel, a copy of whose opinion will be furnished with bonds if desired."

Print the following portion of exhibit "F" to the deposition of N. W. Harris:

"This indenture, made this first day of April, A. D. 1901, by and between Des Moines City Railway Company, a corporation created and existing under and by virtue of the laws of the State of Iowa, hereinafter sometimes called "Railway Company," party of the first part, and Illinois Trust and Savings Bank, a corporation under the laws of Illinois, and William H. Henkle, of Chicago, Illinois, hereinafter sometimes called "Trustees," parties of the second part, witnesseth: * * *

Now, Therefore, for and in consideration of the premises and the sum of one dollar cash in hand paid to the party of the first part hereto by the parties of the second part hereto before the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, and in order to secure the payment of said three thousand bonds and the interest thereon according to the tenor of said bonds and the interest coupons thereto attached, the party of the first part hereto has granted, bargained, sold, transferred, aliened, remised, released, conveyed, assigned and set over and does by these presents grant, bargain, sell, transfer, alien, remise, release, convey,

assign and set over unto the parties of the second part hereto, their successors in trust and assigns forever, the following described premises and property, to-wit: * * *

2nd. All and singular the lines of railroad and street railway of the party of the first part hereto, and all of its buildings, road beds, rights of way, cars, tracks, machinery, engines, boilers, dynamos, electrical machines, motors and other electrical apparatus,
2775 rolling stock, poles, lines, rails and street railway plant and equipment of all kinds; also all of the rights, liberties, leases, privileges and franchises of the party of the first part hereto and all other property, real, personal and mixed, and wheresoever situate now belonging to the party of the first part hereto, as well as all the property of all kinds whatsoever, real, personal and mixed, which the party of the first part hereto may hereafter acquire, with the rents, issues and profits of all of the same. * * *

Filed for record May 20, 1901. Recorded in book 418, page 263."

Print the following portion of exhibit "G" to the deposition of N. W. Harris:—

"We own and offer $5,000 refunding mortgage five per cent. gold bonds issued by the Des Moines City Railway Company * * *

The franchise under which the company is operating is broad and liberal in its terms and perpetual. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office * * *

Circular No. 1124."

Print the following portion of exhibit "H" to the deposition of N. W. Harris:—

"We own and offer refunding mortgage five per cent. gold bonds issued by the Des Moines City Railway Company * * *

The franchise of the company is perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office * * *

Circular No. 1291."

Print the following portion of exhibit "I" to the deposition of N. W. Harris:—

2776 * * * The franchise of the company is perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen in our office. * * *

Circular No. 1291A."

Print the following portion of exhibit "J" to the deposition of N. W. Harris:—

"* * * The franchise of the company is perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office. * * *

Circular No. 1353."

Print the following portion of exhibit "K" to the deposition of N. W. Harris:—

"* * * The franchise of the company is considered perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office. * * *

Circular No. 1416."

Print the following portion of exhibit "L" to the deposition of N. W. Harris:—

"* * * The franchise of the company is considered perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office. * * *

Circular 1444."

2777 Print the offer of exhibit "53" in evidence made by the complainant.

In connection with exhibit "67," print affidavit and exhibits "A," "B" and "C."

In connection with the printing of exhibits "89" to "90," print acknowledgments and certificates of recorder.

In connection with the printing of exhibit "95," print acknowledgment and certificate of recorder.

In connection with the printing of exhibits "141" and "142," print acknowledgments and certificates of recorder.

In connection with the printing of parts of exhibit "224," print the following:—Title page and certificate on page facing the index.

Print the copy of the petition in City of Des Moines, plaintiff *vs.* Des Moines City Railway Company, defendant, attached to the deposition of Wm. H. Bremner and marked "Complainant's exhibit '225.'"

The appellee asks that the portions of the record which it has herein designated as material be printed with, and in addition to the portions of the record designated by the appellant as the parts thereof to be printed.

Des Moines, Iowa, February 10th, 1908.

DES MOINES CITY RAILWAY COMPANY, *Appellee,*

By N. T. GUERNSEY,
W. L. READ,
GEO. H. CARR,
*Its Solicitors.*

Service of the foregoing notice is hereby accepted on this
2778 11 day of February, A. D. 1908, and receipt of copy thereof acknowledged.

W. H. BREMNER,
*City Solicitor,*
HOWARD J. CLARK,
WM. H. BAILY,
*Solicitors for Appellant,*
By WM. H. BAILY, *Of Counsel.*

2779 [Endorsed:] File No. 20,840. Supreme Court U. S. October Term, 1907. Term No. 437. City of Des Moines, Appellant, *vs.* Des Moines City Railway Co. Designation by counsel for appellee of additional parts of record to be printed & proof of service of copy of same. Filed Feb'y 13th, 1908.

2780 In the Supreme Court of the United States.

THE CITY OF DES MOINES, Appellant,

*vs.*

DES MOINES CITY RAILWAY COMPANY, Appellee.

*Stipulation.*

In the above entitled cause, it is stipulated as follows:—

*First.—Exhibit "2,"* which is not printed in full in the record, is a certified copy of the original and amended and substituted articles of incorporation of the Des Moines and Sevastopol Street Railway Company, showing that said company was a corporation organized under the laws of the state of Iowa on the 15th day of November, 1883, and that the business which it was authorized to transact was the construction and operation of one or more street railway lines in the city of Des Moines, Polk county, Iowa, and in the vicinity thereof.

*Second.—Exhibit "3,"* which is not printed in full in the record is a certified copy of the articles of incorporation of the Des Moines Broad Gauge Street Railway Company, showing that said company was a corporation organized under the laws of the state of Iowa on the 7th day of December, A. D. 1885, and that the business which it was organized to transact was the construction and operation of one or more lines of street railway in the city of Des Moines, Polk county, Iowa, and in the vicinity thereof.

*Third.—Exhibit "4,"* which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines Street Railroad Company, showing that said company was a corporation organized under the laws of the state of Iowa, June 30th 1886, and that the business which it was organized to transact was the acquisition by construction or purchase, or both, of railways
2781 in the streets of the city of Des Moines and town of North Des Moines and the adjoining towns and territory, and the operation of the same, including the power to purchase or lease the property, real or personal, franchises, privileges, rights and capital stock of the corporation known as the Des Moines Street Railway Company and to own, maintain and operate the same, along and upon the streets of Des Moines, North Des Moines and vicinity.

*Fourth.—Exhibit "5,"* which is not printed in full in the record, includes certified copies of two amendments to the original articles of incorporation, and the amended and substituted articles of in-

corporation of the Des Moines Street Railroad Company. The first amendment to the articles of incorporation of the Des Moines Street Railroad Company, increased the capital stock of the corporation to one million dollars; the second amendment to the said articles further increased said stock to two million dollars, and enlarged the powers of its board of directors. The amended and substituted articles of incorporation of said company, show it to be a corporation known as the Des Moines Street Railroad Company, organized under the laws of the state of Iowa, September 27th, 1892, and that the business to be transacted by it, is the acquisition by construction or purchase, or both, of railways upon the street or highways of the city of Des Moines, and adjoining towns and territory, including the right to operate the same and the power to purchase or lease the property, real or personal, franchises, privileges, rights and capital stock of the corporation known as the Des Moines Street Railroad Company, and own, maintain, and operate the same.

*Fifth.—Exhibit "6,"* which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines Rapid Transit Company, showing that said company was a corporation organized under the laws of the state of Iowa on the 6th day of September, A. D. 1887, the business to be transacted
2782 by it being the construction and operation of rapid transit railways in and about the city of Des Moines, and buying and selling land.

*Sixth.—Exhibit "7,"* which is not printed in full in the record, is a certified copy of the articles of incorporation and an amendment thereto of the Des Moines Belt Line Railway Company, showing that it was a corporation organized under the laws of the state of Iowa on the 23d day of April A. D., 1888, the business to be transacted by said corporation being, to construct, own and operate one or more lines of railroad in, through, and around the city of Des Moines, Iowa, and its suburbs.

*Seventh.—Exhibit "8,"* which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines Electric Railway Company, showing that said company was a corporation organized under the laws of the state of Iowa, July 31st, 1888, and that the business which said company was organized to transact was the acquisition by construction, purchase or lease of street railways, and their equipment and franchises in and along the streets and alleys of the city of Des Moines, the towns of North Des Moines, Capital Park, Grant Park, Chesterfield, Sevastopol, and all other towns and suburbs of the city of Des Moines in the county of Polk, together with all necessary or convenient charters or franchises from said city, towns or counties, and to construct, purchase and operate street railways.

*Eighth.—Exhibit "9,"* which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines River Line Street Railway Company, showing that said company

POOR COPY

was organized under the laws of the state of Iowa, September 5th, 1888, the business to be transacted by said company being the construction, purchasing, leasing, owning and operating of one or more lines of street railroads in the streets and public places in the city of Des Moines, and in such other cities or incorporated towns, as may be determined by the board of directors.

2783 *Ninth.—Exhibit "10,"* which is not printed in full in the record, is a certified copy of the articles of incorporation and an amendment thereto of the Des Moines Suburban Railway Company, which show said company was incorporated Feb'y 1st 1889 under the laws of the state of Iowa and the amendment filed on October 9th, 1890, and that the business to be transacted by said company, was the construction, owning and operating of rapid transit railways from and through the city of Des Moines, Polk County, Iowa, to the various suburbs of the said city, and industries situated around said city.

The said amendment to the said articles also provided that said corporation should have the power to purchase and acquire railway lines, privileges and franchises, as well as the capital stock of other companies owning or operating railways or street railway lines, in or near the city of Des Moines, and to operate such railways either as stockholder or owner of its property and franchises with the power to sell its railways, stock, franchises or other property, or lease the same, to other persons or incorporations.

*Tenth.—Exhibit "11,"* which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines City Railway Company, showing said company to be a corporation organized under the laws of the state of Iowa on July 24th, 1893. The business of said company is stated to be the acquisition by construction, lease or purchase of all railways or street railways upon the streets and highways of the city of Des Moines, and the towns adjoining said territory, including any cities, towns or townships in Polk County and the adjoining counties in the state of Iowa, which power shall include the right to acquire rights of way, depot, or other grounds necessary for the operation of its said railways and plant, by purchase, condemnation or otherwise, and also to acquire all necessary rights, privileges and franchises therefor. It is further given the power to own, maintain, sell or dispose of such sys-
2784 tem of railways or street railways, rights, privileges, franchises or property or any part thereof or to operate the same; to carry freight, passengers and mail over and along the same; and to transact and carry on any and all other business over and along the said railways and plant as is usually, or may hereafter be transacted or carried on *th* through roads and plants of like character.

*Eleventh.* That all exhibits purporting to be copies of ordinances resolutions or other matters shown by the records of the city of Des Moines, or of the various towns now incorporated in said city, were duly authenticated by the certificates of the proper officers, attached thereto, and that all other copies of public records read in evidence were duly authenticated in like manner.

*Twelfth.* That this stipulation shall be printed by the clerk as a part of the record in this cause.

Dated February 10th, 1908.

WM. H. BREMNER,
WM. H. BAILY,
HOWARD J. CLARK,
*Solicitors for Appellant.*
N. T. GUERNSEY,
W. L. READ,
GEORGE H. CARR,
*Solicitors for Appellee.*

2785 [Endorsed:] File No. 20,840. Supreme Court U. S. October Term, 1907. Term No. 437. City of Des Moines, Appellant, *vs.* Des Moines City Railway Co. Stipulation of counsel as to Exhibits in transcript of record. Filed Feb'y 13th, 1908.

Endorsed on cover: File No. 20,840. S. Iowa C. C. U. S. Term No. 437. City of Des Moines, appellant, *vs.* Des Moines City Railway Company. Filed August 30th, 1907. File No. 20,840.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

## No. 171.

CITY OF DES MOINES, APPELLANT,

*vs.*

DES MOINES CITY RAILWAY COMPANY, APPELLEE.

## BRIEF AND ARGUMENT FOR APPELLEE.

### STATEMENT.

Th ultimate question presented for decision is whether the appellee, the Des Moines City Railway Company, has the right to maintain and operate its street railways in the city of Des Moines.

The appellee is the successor of various companies, to which, as well as to the present company, the city of Des Moines has granted street railroad rights. The earliest grant was by the Turner ordinance dated December 10, 1866 (Exhibit "A" to bill, p. 18). The controversy in the court below centered about the construction of this grant. The immediate occasion for the filing of the bill was a resolution passed by the city council of the city of Des Moines November 21, 1905, requiring the appellee within twenty-five days to remove its tracks, poles and wires from the streets, bridges and public places of the city, and to restore the pavement

where the street had been paved. On the 27th of November, 1905, the complainant filed its bill for an injunction and, after a hearing upon the merits, an injunction was granted.

This resolution was the culmination of an attack upon this contract which originated in a *quo warranto* suit on the relation of several private individuals. Later the matter was taken up by the city.

When the resolution in question was passed, the appellee owned and operated about seventy-five miles of track in Des Moines. It is conceded that the service was modern and excellent. For a long series of years prior to about the time of the adoption of the resolution referred to, the appellee and its assignors had exercised their rights, with knowledge upon the part of the city that this ordinance was construed to be unlimited as to time, and with full acquiescence by the city in this construction.

## The Issues.

The bill alleges the following matters that are admitted:

(*a*) That the complainant is an Iowa corporation organized July 24, 1893, with its principal place of business in Des Moines, for the purpose, among other things, of acquiring by construction, lease or purchase, railways or street railways in the City of Des Moines, with all the powers necessary to transact this business (Record, pp. 1 and 23).

(*b*) That the defendant city is a city of the first class, organized under the general laws of the State of Iowa as to municipal corporations, and having all of the powers of such corporations (Bill, par. 2, p. 2; Answer, par. 2, p. 23).

(*c*) The enactment and acceptance of the Turner ordinance dated December 10, 1866, and of the amendment thereof dated February 8, 1872, and of the further amendment thereof dated December 18, 1877, and of the further amendment thereof dated March 8, 1890 (Record, pp. 2, 3, 4 and 9, and pp. 23 and 24, paragraphs 3, 4, 5 and 10 of the answer).

(*d*) That the rights granted by the Turner ordinance as amended were, so far as they are legally assignable, assigned by the original grantee, the Des Moines Street Railway Company, to the Des Moines Street Railroad Company, and by the latter company to the appellee (par. 26 of the bill, p. 12; answer, par 15, p. 24).

(*e*) That as the outcome of the controversy between the said Des Moines Street Railroad Company and the city of Des Moines, a decree was entered in 1887 by the Supreme Court of the State of Iowa enjoining the city of Des Moines from interfering with extensions of its tracks which the street railroad company might then or thereafter need to make under the said ordinance of December 10, 1866 (Record, p. 5 and p. 24).

(*f*) The passage of the South Des Moines ordinance upon November 9, 1883, and its acceptance (Bill, par. 11, p. 6; answer, par. 9, p. 24).

(*g*) The passage of the Broad Gauge Street Railway ordinance and its acceptance (Bill, par. 19, p. 11; answer, par. 13, p. 24).

(*h*) The enactment of certain consolidation resolutions September 5, 1889, and that the consolidation was conditioned on their adoption, and that they were accepted (Bill, par. 13, p. 7; answer, par. 9, p. 24).

(*i*) That in reliance upon these resolutions, various street railroad properties in Des Moines were consolidated at large expense (Bill, par. 14, p. 9; answer, par. 9, p. 24).

(*j*) That these consolidation resolutions and the ordinance of March 8, 1890, passed in conformity with them, were ratified by an act of the legislature of the State of Iowa, effective April 30, 1890 (Bill, par. 15, p. 9; answer, par. 10, p. 24).

(*k*) That under the Broad Gauge Street Railway ordinances referred to in the bill, street railroads were constructed and operated.

(*l*) That the so-called Belt Line ordinance was passed May 16, 1888; that it was accepted, and that lines were built and

operated thereunder (Bill, par. 22, p. 12; answer, par. 13, p. 24).

(*m*) That the so-called River Line ordinance was enacted on September 20, 1888; that it was accepted, and that lines were built thereunder (Bill, par. 23, p. 12; answer, par. 13, p. 24).

(*n*) That the so-called Rapid Transit ordinances of May 14, 1888, and August 21, 1888, were enacted and accepted, and tracks constructed and operated under the earlier one (Bill, par. 24, p. 12; answer, par. 12, p. 24.)

(*o*) That all these ordinances and the rights granted under them were assigned to the appellee, and that the appellee has maintained and operated the entire system since about the 25th of August, 1893.

(*p*) That the work of building additional lines and of rebuilding existing lines done since January 1, 1898, has been with the knowledge of the city of Des Moines, and that the defendant company has, during that period, been assessed for paving and general taxes.

(*q*) That the appellee and its assignors have at all times claimed the rights now asserted by the appellee.

(*r*) That it is necessary that extensions of existing lines be built from time to time to furnish adequate service, and to successfully maintain and operate the present system.

(*s*) That the resolution of November 21, 1905, ousting the appellee, was passed upon that date and was served upon the appellee November 24, 1905. That the appellee is engaged in carrying the United States mails.

(*t*) That the lines of the appellee furnish the only means of intra-urban transit for the majority of the people in the city of Des Moines.

The denials of the answer are, in substance, limited to the following matters:

(*a*) A denial of knowledge as to what the Des Moines Street Railroad Company did prior to 1886 in reliance upon the Turner ordinance.

(*b*) A denial that the ordinances were legally assignable, and a denial that the assignments of them vested any rights in the appellee.

(*c*) A denial that the street railroad case in the Supreme Court of Iowa adjudicated the Turner ordinance to be a contract.

(*d*) A denial of the conclusion that the enactment of the various revisions of the city ordinances amounted in law to a re-enactment of the Turner and other street railroad ordinances.

(*e*) A denial that the city has in ordinances and resolutions recognized the present company as the holder of these various rights.

(*f*) A denial that the case of the *Des Moines City Railway Company vs. City of Des Moines*, 90 Iowa, 770, involved the question whether these rights had been assigned to and were held by the appellee.

(*g*) A denial that the Turner ordinance exists as a contract, and an averment that the rights granted by it were for but a limited time, with an averment that this time has expired.

(*h*) A denial that appellee's expenditures were in reliance upon this ordinance, or that the city has treated it as in force, or that the city has required or compelled extensions or changes, and a denial of the right to operate or extend and of intention to interfere with the appellee's legal rights.

(*i*) A denial of the bonded debt.

(*j*) A denial of any vested rights in appellee, and that this suit presents a Federal question.

It will be observed that these denials relate almost solely to legal conclusions. About the facts there is substantially no dispute.

## THE FACTS.

The history of the street railways in Des Moines is briefly as follows:

1866, December 10th, the ordinance in question was enacted, granting to the Des Moines Street Railway Company, its successors and assigns, certain rights in the streets. A copy of this ordinance is Exhibit "A" to the bill (p. 18). This ordinance as amended is upheld by the decree of the court below. It is frequently referred to as the Turner ordinance. The Turner company built a line which was operated by animal power. It later acquired rights in the town of North Des Moines, then a suburb, but since 1890 a part of the city of Des Moines, and operated tracks in North Des Moines as a part of its system. In all, in 1886, when it was sold to the Des Moines Street Railroad Company, it had about ten miles of narrowgauge track. Speaking generally, the track was light, the equipment poor and the service worse.

1886, July 1, the Des Moines Street Railway Company (the original Turner company) sold its railway and rights to the Des Moines Street Railroad Company, a new corporation organized to take over the property.

In the meantime, interest had arisen in the street railway situation, and the city began to enact additional street railroad ordinances, and in the period from 1883 to 1889, it granted rights to the Des Moines Broad Gauge Street Railway Company, the Des Moines and Sevastopol Street Railway Company, the Des Moines Rapid Transit Company, the Des Moines Belt Line Company, the Des Moines Electric Railway Company, the Des Moines River Line Railway Company, and the Des Moines Suburban Railway Company. Several of these companies held grants from adjoining towns, in addition to those from the city itself. All of these adjoining towns became a part of the city in 1890.

1886, June 29th, the city enacted the Broad Gauge ordinance (Exhibit 26, p. 96). Under this ordinance, tracks were constructed and there immediately ensued controversies between the Broad Gauge Company and the Street Railroad Company, and between the last-named company and the city. The tracks constructed under the Turner ordinance, at this time owned by the Des Moines Street Railroad Company, were all narrow gauge.

The controversy between the companies was whether under section 10 of the Turner ordinance, the Street Railroad Company had an exclusive right entitling it to an injunction against the building of the tracks which the Broad Gauge Company was constructing. As between the old company and the city, the question was whether the Turner ordinance constituted a contract under which the old company was entitled to an injunction to prevent the city's interference with extensions of its tracks which the company was making and might need to make in the future.

1887, June 27th, these cases were decided by the Supreme Court of the State, that court holding that the old company was entitled to an injunction in each instance.

*Street Railroad cases*, 73 Iowa, 513.

*Street Railroad cases*, 74 Iowa, 585.

1887, December 20th, immediately after the decision on the rehearing in the cases referred to, the city granted to the Broad Gauge Company the right to construct, maintain and operate tracks, with electricity as the motive power (Exhibit 57, p. 138).

In

*Teachout vs. Des Moines Broad Gauge Street Ry. Co.*, 75 Iowa, 722,

the Supreme Court of the State held that this electric grant did not violate the exclusive right granted by the Turner ordinance, which was held to include animal power only.

1889, September 5th, the consolidation resolutions were passed, and the broad gauge properties were acquired by the old company. The conditions leading to this consolidation were as follows:

There had been an uninterrupted controversy since 1886 between the Broad Gauge Company and the Des Moines Street Railroad Company, and between the latter and the city. The situation was intolerable. There were frequent clashes between the employés of the companies and the police officers of the city. There were in the city several street railroads, none of them operated with reference to either of the others. One was narrow gauge; the others were broad gauge. For a passenger to cross the city involved the payment of several fares, several transfers, with more or less walking from one road to another and waiting for connections. A suit had been brought by the city against the Des Moines Street Railroad Company praying the forfeiture of the Turner ordinance. Another suit was pending by the Des Moines Street Railroad Company against the Broad Gauge Company and the city for damages.

At this time Mr. J. S. Polk was not interested in the Des Moines Street Railroad Company or in the Broad Gauge Company, but was interested in some relatively insignificant street railroad properties in the city. He was requested by city officials and by various private citizens (p. 602) to attempt to end these controversies and place the properties in a position where they could be rehabilitated and the service could be improved, by bringing about a consolidation of the conflicting street railroad interests. He undertook and accomplished this. After securing options on various properties, as a condition to consummating the matter, he required:

*First* That there should be granted the right to use electricity as the motive power under the Turner ordinance.

*Second*. That the suit of the city to declare it forfeited should be compromised.

These objections were complied with by the passage of the resolutions of September 5, 1889. At the time that these negotiations were had, Mr. Polk knew that all parties, including the city, regarded the Turner ordinance as a grant of a permanent right, and that the city in the litigation between it and the Des Moines Street Railroad Company had formally placed this construction upon it. (Record, p. 603.)

1889, October 1st, the consolidation was completed by the conveyance of the property of the Broad Gauge and Sevastopol companies to the Des Moines Street Railroad Company. The work of rebuilding the various properties, broadening the gauge of the old narrow gauge track, removing tracks that were unnecessary because they were duplications, connecting the various lines so as to make one system out of them, and equipping the entire system for operation by electricity was undertaken and promptly completed.

The street railroad lines then existing, but not at that time conveyed to the Des Moines Street Railroad Company, were owned by companies which were operating in harmony with it or were soon acquired by it, so that all the street railroads within the city were operated as a single system. This situation continued, without change, until 1893.

1893, July 25th, the Des Moines Street Railroad Company and the other companies conveyed all of the street railroad properties in Des Moines to the appellee, the Des Moines City Railway Company. This brought under a single ownership the entire property which had theretofore been under one management. Until January 1, 1898, and thereafter, and until the fall of 1905, the situation continued without friction between the company and the city.

January 1, 1898, is the date upon which the city now contends that the rights under the Turner ordinance expired. After that date and prior to the fall of 1905, the city in numerous ways recognized this ordinance as still in force. On that date the company had 38.71 miles of track. Prior to the bringing of this suit 25.925 miles of this track had been rebuilt, and 37.78 miles of new track had been added. The company was regularly assessed for taxes. It was assessed for paving upon streets where track existed. It was required to pay the value of paving where it occupied streets already paved, and the money so paid by it was distributed to the abutting property owners. It was required to make various extensions. It rebuilt with large additions its power plant. It bought new equipment. All this was done without a suggestion that there was any question about its rights in the streets.

It is not contended that the company has not fulfilled all of its obligations to the public. It is not contended that it has failed to furnish adequate service at a reasonable price. The evidence that the facilities and service are much superior to those usually found in a city of the size of Des Moines is uncontradicted (Record, p. 573). In reliance upon the rights held by the company under the Turner ordinance, its bonds have been purchased by investors to the amount of about three million dollars, all of which has gone into the property. Since the organization of the first company, no dividends have been paid, but all surplus earnings have been used in developing and building up the property.

In the *Street Railroad Cases*, to which we have referred, the validity of the Turner ordinance as a contract between the city and the company has been determined by the Supreme Court of the State of Iowa. Therefore there remains but one ultimate question which may be a matter of argument, viz., the proper construction to be put upon this contract.

# BRIEF.

## I.

*For forty years, commencing with the enactment of the Turner ordinance, the city consistently construed the contract to be without limit as to time.*

The circumstances attending the enactment of the ordinance, as well as the subsequent transaction between the company and the city, and especially what transpired after it is now contended that the rights under the ordinance expired, are all material to its construction.

(*a*) *The circumstances surrounding the enactment of the ordinance.*

In Iowa a party to a contract is bound by the construction of it which he had reason to suppose the other party placed upon it.

*Code*, section 4617.

*Evans vs. McConnell*, 99 Iowa, 326.

The changes made in the Indianapolis ordinance used as a model and the other circumstances show that when the ordinance was enacted the city knew the purpose was to make a permanent grant.

(*b*) *The period from 1886 to 1889.*

Through grants of a competing company, a bitter controversy arose between the old company, the new company, and the city, covering a period of three years. The evidence shows that during this entire period, when the ingenuity of counsel for the city was taxed to its utmost to devise means to overthrow this Turner grant, it was never

suggested that the grant was limited, but on the contrary its unlimited duration was recognized.

*Des Moines City Railway Company vs. City of Des Moines*, 73 *Iowa*, 513,

which grew out of this controversy, recognized the Turner ordinance as a valid contract. In this case the city was perpetually enjoined from interfering with the exercise of rights under it.

In this suit, the city, in a formal petition for rehearing, deliberately and affirmatively recognized this grant as permanent.

In 1889 this controversy was ended by a consolidation of the two companies. Throughout this consolidation and the subsequent financing and rehabilitation of the property, the permanency of this Turner grant was taken as the fundamental basis of the transaction.

(*c*) *From 1889 to 1898.*

It is upon the 1st of January, 1898, that it is now contended that this grant ended. From the reorganization in 1889 until this time, the grant was continually recognized as in force by the city. In the summer of 1893 the present company was organized and took over the property and new bonds were issued upon the faith of this construction.

(*d*) *Transactions after January 1, 1898.*

After the 1st of January, 1898, and until the passage of the resolution in controversy in this case, the city frequently and unequivocally recognized the Turner grant as in force. It did this by the enactment of numerous ordinances and resolutions, and otherwise.

January 1, 1898, the company had 38.71 miles of track. After that date, with the knowledge and concurrence of the city, it rebuilt 25.95 miles of this track and added 37.78 miles of new track without a suggestion that its rights had expired, and much of this work was done at

order or request of the city. The city required the company to pave, it assessed the company for taxation, and in every way recognized it as entitled to occupy the streets.

## II.

*That the ordinance in question constitutes a contract, has been authoritatively determined, so that there remains only the question of construction.*

In the

*Street Railroad Cases*, 73 Iowa, 513; 75 Iowa, 585,

the validity of this Turner ordinance as a contract was adjudicated by the supreme court of the State.

In

*Des Moines City Railway Company vs. City of Des Moines*, 90 Iowa, 770,

the present company was recognized as the holder of this contract. The validity of the contract having been established by these cases, there remains simply the question of its construction.

## III.

*The grant in the Turner ordinance of December 10, 1866, is without limit as to time.*

Upon the face of this ordinance, the grant is unlimited as to time. The first section grants a general right, and section 10, instead of being a limitation, grants, in addition, an independent exclusive right.

The contention that section 10 limits section 1 is unsound, because:

(*a*) The general scope of section 10 is to add to the grant and not to diminish it.

(*b*) The words "after the expiration of said term" recognize the existence of the general right after the exclusive right has expired.

(*c*) The words "impair or destroy" could have no force, if there were no right to impair or destroy, after the expiration of the thirty-year term.

(*d*) Section 10, if rewritten in the language of the supreme court of the State, relates solely to the additional independent exclusive grant.

(*e*) The obligation to make extensions referred to in the opinion in the street railroad cases is unlimited.

(*f*) The opinion clearly treats the ordinance as making two independent grants, one by section 1 and the other by section 10.

The words "and for the time," under the doctrine of

*Railway Company vs. Nave*, 38 Kansas, 744,

as approved and applied in

*Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234-248,

clearly must refer to the time limited for performing the conditions subsequent, as to the construction of track, etc.

IV.

*A grant unlimited as to time is permanent.*

The proposition is thoroughly well settled that a grant on right in a street, not limited as to time, is permanent.

*Detroit vs. Detroit Citizens St. Ry. Co.*, 184 U. S., 369-394.
*People vs. O'Brien*, 111 N. Y., 1.
*Louisville Trust Co. vs. Cincinnati*, 76 Fed., 296.
*Blair vs. Chicago*, 201 U. S., 486.
*Kansas City Water Works Cases*, 65 Fed., 691.
*State vs. Commissioners*, 61 N. J. L., 470.
*State vs. Traction Co.*, 62 N. J. L., 386.
*State vs. Ladies of the Sacred Heart*, 99 Mo., 533.
*Suburban Electric L. & P. Co. vs. East Orange*, 41 Atl., 865; 44 Atl., 628 (not officially reported).
*State ex. rel. Mayor, etc., of Jersey City*, 49 N. J. L., 303.

*Railroad Company vs. New Orleans*, 46 La. Ann., 526.
*Africa vs. Mayor, etc.*, 70 Fed., 729.
*Id. on Appeal*, 77 Fed., 507.
*Trustees of Southampton vs. Jessup*, 162 N. Y., 122.
*Seattle vs. Columbia, etc., Railroad Co.*, 6 Wash., 379.
*Port of Mobile vs. Louisville & Nashville R. R. Co.*, 84 Ala., 115.
*Milhau vs. Sharp*, 27 N. Y., 611.

Nor can it be contended that the right was limited to the life of the grantee.

*Detroit vs. Detroit Citizens St. Ry. Co.*, 184 U. S., 394.
*People vs. O'Brien*, 111 N. Y., 1.
*Blair vs. Chicago*, 201 U. S., 486.

And under the laws of Iowa the original company has not expired, and it, as well as the succeeding companies, has the right to renew indefinitely.

*Revision of 1860*, Secs. 1151, 1158.
*Sioux City Terminal R. & W. Co. vs. Trust Co.*, 82 Fed., 124.
*Thompson vs. Lambert*, 44 Iowa, 239.

V.

*The established canons of construction.*

There are certain established canons of construction to which resort must always be had.

(*a*) *The rules of construction applicable to the statutes are likewise applicable to legislative enactments of cities.*

*In re Yick Yo*, 68 Cal., 294.
*Zorger vs. City of Greensburgh*, 60 Ind., 1, 5.
*Martin vs. City of Oskaloosa*, 126 Iowa, 680.
*Denning vs. Yount*, 9 Kans. App., 708.
*Id.*, 62 Kans., 217.
*Ashland Water Co. vs. Ashland County*, 87 Wis., 209.
*People vs. Mayor, etc., of Brooklyn*, 14 App. Div., 556.
*State vs. Kirkley*, 29 Md. 85-103.
*Doane vs. City of Omaha*, 58 Neb., 815.
*People vs. Harrison*, 185 Ill., 307.

(*b*) *The history of the act may be resorted to in aid of its interpretation.*

*Aldridge vs. Williams*, 3 How., 23.
*United States vs. Union Pacific R. Co.*, 91 U. S., 79.
*S. W. Mo. Lighting Co. vs. Scheurich*, 174 Mo., 235.

(*c*) *Contemporary construction is entitled to great weight.*

*Hahn vs. United States*, 107 U. S., 402-406.
*In re Washington St. A. & P. R. Co.*, 115 N. Y., 442.

(*d*) *The practical construction given to an enactment by those whose duty it is to enforce it, is entitled to great weight and will not be disregarded and overthrown except for cogent reasons, and unless it is clear that such construction is erroneous.*

*Sutherland Stat. Constr.* (2d ed.), par. 474.
*Westbrook vs. Miller*, 56 Mich., 148.
*Turnpike Co. vs. Commonwealth*, 96 Ky., 225.
*Bloxham, Comptroller, vs. Street R. R. Co.*, 36 Fla., 519.
*United States vs. Union Pacific R. Co.*, 148 U. S., 562.
*Bank vs. Parker*, 192 U. S., 73.
*People vs. Fidelity & Casualty Co.*, 153 Ill., 25.

(*e*) *Acts of the parties.*

It is settled that the familiar doctrine that the acts of the parties may be resorted to in aid of the construction of a contract, applies to contracts with municipal corporations.

*Chicago vs. Sheldon*, 9 Wall., 54.
*Blair vs. Chicago*, 201 U. S., 486.
*Van Hostrup vs. Madison City*, 1 Wall., 291.
*St. Louis Gas Light Co., vs. St. Louis*, 46 Mo., 121.
*Mobile vs. L. & Nashville R.*, 84 Ala., 115.
*State ex rel. vs. Mayor*, 49 Mo., 401.
*City Ry. Co. vs. Street Ry. Co.*, 38 Pac., 986.
*Auditor vs. Cain*, 22 Ky. L. Rep., 1888.
*Sherwin vs. Bugbee*, 16 Vt., 439.

(*f*) *Matters in pari materia.*

All enactments pertaining to the same subject matter must be read together, as if enacted at the same time as a part of a single law.

*Pennsylvania Co. vs. Frana*, 13 Ill. App., 91.
*Chicago vs. Sheldon*, 9 Wall., 50.
*State vs. Shaw*, 28 Iowa, 78.
*State vs. Sherman*, 46 Iowa, 415-422.
*Chamberlain vs. Iowa Tel. Co.*, 119 Iowa, 619.
*Alexander vs. Alexander*, 5 Cranch, 1-7.
*United States vs. Freeman*, 3 How., 556-564.
*Atkins vs. The Disintegrating Co.*, 18 Wall., 272-301.
*Cope vs. Cope*, 137 U. S., 682-688.
*Stockdale vs. The Insurance Companies*, 20 Wall., 323.
*Sutherland on Stat. Constr.* (ed., 1904), par. 448.
*Perkins vs. Perkins*, 62 Barb., 531-534.
*In re Livingston*, 121 N. Y., 94-104.
*Commonwealth vs. Sylvester*, 13 Allen, 247.
*In re Hall*, 38 Kans., 670.
*Powell vs. Sherwood*, 162 Mo., 605.
*Railroad Co. vs. Zerneeke*, 59 Neb., 689.
*Commissioners vs. Life Ins. Co.*, 90 Fed., 222.
*Cochen vs. Meth. Prot. Church*, 32 App. Div., 239.
*Duncan vs. Owens*, 47 Ark., 388.
*Merrill vs. Gorham*, 6 Cal., 41.
*Ferrari vs. Board of Health*, 24 Fla., 390.
*People ex rel. vs. Hazlewood*, 116 Ill., 319.
*Hunt vs. Railway Co.*, 121 Ill., 638-644.
*State vs. Township*, 6 Ind., 83-90.
*State vs. Gerhardt*, 145 Ind., 439.
*Kollenberger vs. People*, 9 Col., 233.
*Cincinnati vs. Guckenberger*, 60 Ohio St., 353.
*Town vs. State*, 59 Vt., 39.
*Simpkins vs. Ward*, 45 Mich., 559.
*Trust Co. vs. Iron & Coal Co.*, 47 Fed., 136.
*State vs. Newport St. Ry. Co.*, 16 R. I., 533.

## VI.

*The rule of strict construction.*

This rule may only be invoked where a doubt fairly arises which cannot be resolved by the application of the rules of construction.

*Blair vs. Chicago*, 201 U. S., 400,

states at pages 465 and 466 considerations which require its application radically differing from the case at bar. This rule does not apply where the intent of the parties can be ascertained nor where it would lead to unjust or inconvenient results not contemplated or intended.

*People ex rel. The Gas Company vs. Deehan*, 153 N. Y., 528-532.

*Trustees of Southampton vs. Jessup*, 162 N. Y., 122-127.

And the office of this rule is not to compel an immediate surrender to an ambiguity wherever it is suggested.

*Citizens Bank vs. Barker*, 192 U. S., 73-85.

In the case at bar the city has for forty years concurred in the interpretation of this ordinance, which it now seeks to repudiate. This rule of strict construction cannot be invoked in order to create an ambiguity, by engrafting upon the grant a constructive limitation in direct opposition to the intention of the parties as demonstrated by such a course of conduct.

## VII.

*The city is estopped from assailing the Turner ordinance.*

The evidence shows without controversy that from 1889 to 1905 both parties to this contract have acted upon the assumption that it was without limit as to time and that upon the faith of this, substantially the entire investment in the present plant has been made.

The powers of the city which are involved here are its

proprietary or business powers and in their exercise it is bound by the rules which apply to private individuals.

*Illinois Trust & Savings Bank vs. City of Arkansas City*, 76 Fed., 271.

This case is approved by this court in

*Walla Walla vs. Walla Walla Water Co.*, 172 U. S., 1, 10.
*Omaha Water Co. vs. City of Omaha*, 147 Fed., 1.
*Bailey vs. Mayor, etc.*, 3 Hill (N. Y.), 538.
*State ex rel. vs. Barker*, 116 Iowa, 96-103.
*Zabriskie vs. R. R. Co.*, 23 How., 381-400-401.

It is no answer to say that the code of Iowa has, since 1897, required a vote of the people in order to grant a right as to poles and wires.

*Code of 1897*, Sec. 775-776.

No vote of the people is necessary in order to authorize the construction and maintenance of tracks. It is only necessary as to poles and wires. Moreover, under the authorities, the estoppel shown by this evidence is good not only against the city, but as against the state and abutting property owners. All interested persons who stood by and saw this expenditure on the faith of this right and without objection are estopped.

*Attorney General ex rel. vs. R. R. Co.*, 24 N. J. Eq., 50.
*State ex rel. West vs. Des Moines*, 96 Iowa, 521.
*State vs. Town of Westport*, 116 Mo., 582.
*State of Arkansas vs. Leatherman*, 38 Ark., 188.
*Cooley on Constitutional Limitations* (4th Ed.) p. 312.
*Attorney General vs. Superior & St. Croix R. Co.*, 93 Wis., 604.
*C. R. I. & P. R. Co. vs. City of Joliet*, 79 Ill., 25-37.
*City of Atlanta vs. Gate City Gaslight Co.*, 71 Ga., 125.
*Penna. R. Co. vs. Montgomery County Passenger Ry. Co.*, 167 Pa., 62.
*State ex rel. vs. Janesville Water Co.*, 92 Wis., 496.
*Spokane St. Ry. Co. vs. Spokane Falls*, 6 Wash., 521-524.

This doctrine is unequivocally recognized in

*Street Railway Cases*, 73 Iowa, 522.

The case of

*Cedar Rapids Water Company vs. Cedar Rapids*, 118 Iowa, 234,

relied upon by appellant, is not in point. It involved absolutely no question of estoppel.

## VIII.

*The power of the city to make an unlimited grant is beyond question.*

As already stated, the supreme court of Iowa has determined the validity of this contract.

*Street Railway Cases*, 73 Iowa, 513.

It is held that section 464 of the Code of 1873 granted the power to enact this ordinance.

Section 767, Code of 1897, re-enacts section 464 with the addition of t' powers granted by the act of the twenty-third general assembly, which also affirmatively legalizes the Turner ordinance. This legalizing act would remove all question as to power.

*Louisville Trust Co. vs. City of Cincinnati*, 76 Fed., 296.

*Baltimore Trust Company vs. Baltimore*, 64 Fed., 153.

It has never been the policy of the state of Iowa to limit the term for which street railway grants may be made. There is no limit as to time in section 464 of the Code of 1873 or in this section as re-enacted as 767 of the Code of 1897 or in section 775 of the Code of 1897 as to poles and wires, although in this same code, water, gas and light plants are limited to twenty-five years, by the express provisions of section 720.

The state itself made an unlimited telephone grant.

*Chamberlain vs. Iowa Telephone Co.*, 119 Iowa, 619.

The supreme court of the state has recognized the power granted by section 464 as authorizing a permanent grant.

*O'Neil vs. Lamb*, 53 Iowa, 725.
*Pratt vs. Railroad Co.*, 72 Iowa, 249.
*Fowler vs. Des Moines & Kansas City R. Co.*, 91 Iowa, 533-540.
*City of Des Moines vs. Rock Island R. Co.*, 41 Iowa, 569.

In 1873, when section 464 was enacted first, the custom was to grant unlimited rights. The word "authorize" is broad.

*Blair vs. Chicago*, 201 U. S., 400-457.
*Kansas City Water Works Cases*, 65 Fed., 691.
*State vs. Commissioners*, 61 N. J. L., 470.
*State vs. Traction Co.*, 62 N. J. L. 386.
*Detroit Citizens Street Ry. Co. vs. City of Detroit*, 64 Fed. 628-635-642.
*People ex rel. Woodhaven Gas. Co. vs. Deehan*, 153 N. Y., 528.
*Seattle vs. Columbia, etc., R. Co.*, 6 Wash., 379.

There is no question here as to the power conferred by a mere general authority over the streets. Whether this confers power to grant a street railroad right is doubtful under the authorities. These cases may not properly be invoked here because a street railroad is not, in Iowa, an additional servitude. See

*Snyder vs. Fort Madison St. Ry. Co.*, 105 Iowa, 284.

## IX.

*The argument of appellant that the city was without authority to make the grant in question.*

The complete answer to the contention of appellant that such a grant as the one involved here may not be made with-

out the express delegation of power to the city, is that, as we have already seen, there was this delegation of power in this case.

The argument that this is against public policy, is an attempt, by constructive limitation, to restrict the power expressly granted by the legislature to the city.

No question of public policy can, in fact, arise. If the city is without power to make a grant it is *ultra vires* and fails without reference to public policy. If the city has the power, the legislative act delegating the power determines the policy of the state in this respect.

That such a legislative enactment determines the policy of the state is clearly recognized by the supreme court of Iowa.

*Board of Park Commissioners vs. Diamond Ice Co.*, 130 Iowa, 603.
*Kuhn vs. Kuhn*, 125 Iowa, 445-453.

The argument of counsel is nothing more nor less than that the court should set aside the legislative declaration of the policy of the state. This is not sound.

*Citizens Water Co. vs. Bridgeport Hydraulic Co.*, 55 Conn., 1-16.

The authorities cited by counsel are those of exclusive grants in which a different rule has always been recognized. This same argument was repudiated by the state of Iowa in the *Street Railroad Cases*. The only case cited by counsel at all analogous in its facts is

*Lake Roland Elevated Ry. Co. vs. City of Baltimore*, 77 Md., 352.

The circuit court of appeals refused to follow it upon the same facts.

*Baltimore Trust & Guaranty Co. vs. The Mayor of the City of Baltimore*, 64 Fed., 153.

The Maryland case is in the face of the overwhelming current of authority.

*People ex rel. Gas Co. vs. Deehan*, 153 N. Y. 528-533.
*Seattle vs. Railroad Co.*, 6 Wash., 379.
*Trustees of Southampton vs. Jessup*, 162 N. Y., 122.
*Phillipsburg Electric Co. vs. Phillipsburg*, 66 N. J. L., 506.
*Suburban Electric Co. vs. Inhabitants of East Orange*, 41 Atl., 865, affirmed in 44 Atl., 628 (not officially reported).
*County of Floyd vs. Rome Street R. Co.*, 77 Ga., 614.
*Nash vs. Lowry*, 37 Minn., 261.
*Citizens Water Co. vs. Bridgeport Hydraulic Co.*, 55 Conn., 1.
*Denver St. Ry. Co. vs. Denver City Ry. Co.*, 2 Colo., 673.
*Capdevielle vs. New Orleans & S. F. R. Co.*, 110 La., 904.

## X.

*Aside from the Turner ordinance, the rights granted under the other ordinances are sufficient to sustain all of the contentions of the appellee, and the fact that the company exercised its rights under the Turner ordinance was not an abandonment of its rights under the other ordinances.*

*Town of Golconda vs. Field*, 108 Ill., 419.
*Chamberlain vs. Iowa Telephone Co.*, 119 Iowa, 619.
*State ex rel. vs. Nebraska Telephone Co.*, 127 Iowa, 194.

Authority to occupy streets not named in the original ordinance could be granted without a vote of the people:

*Thurston vs. Huston*, 123 Iowa, 157.

and these ordinances included the enlarged city when its boundaries were extended.

*Gas Light Co. vs. St. Louis*, 46 Mo., 121.
*Blair vs. Chicago*, 201 U. S., 489.

The rights granted by these ordinances were assignable, and the city consented to their transfer.

*New Orleans, etc., Ry. Co. vs. Delamore*, 114 U. S., 501.
*Detroit vs. Detroit Citizens St. Ry. Co.*, 184 U. S., 368-395.
*Louisville Trust Co. vs. City of Cincinnati*, 76 Fed., 296.
*Mayor of Knoxville vs. Africa*, 77 Fed., 501.
*Detroit Citizens St. Ry. Co. vs. Detroit*, 64 Fed., 628.
*Light & Power Co. vs. Tacoma*, 17 Wash., 661.
*City Ry. Co. vs. Citizens St. Ry. Co.*, 166 U. S., 557.
*Morgan vs. Louisiana*, 93 U. S., 217.

XI.

*This case presents a federal question and the jurisdiction is clear.*

The recent case of

*Northern Pacific R. Co. vs. Duluth*, 208 U. S., 583,

is exactly in point and rules this case. See also

*Mercantile Trust & Deposit Co. of Baltimore vs. City of Columbus*, 203 U. S., 311-322.
*Shoshone Mining Co. vs. Rutter*, 177 U. S., 507.
*Saginaw Gas Light Co. vs. Saginaw*, 28 Fed., 529.
*Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S., 65.
*Pacific Electric Ry. Co. vs. Los Angeles*, 194 U. S., 117.
*City Ry. Co. vs. Citizens Ry. Co.*, 166 U. S., 562.
*Walla Walla City vs. Walla Walla Water Co.*, 172 U. S., 1.
*Iron Mountain R. Co. vs. Memphis*, 96 Fed., 113.
*Riverside A. Ry. Co. vs. City of Riverside et al.*, 118 Fed. 736.

Under the repeated decisions of this court, this resolution is a law and its effect is to destroy the appellant's rights.

The argument that this enactment should be by ordinance and that it is merely administrative, is beside the point as is the argument that the city did not mean what it said.

*Old Colony Trust Co. vs. City of Wichita*, 123 Fed., 779.

The effect of this resolution, if it were permitted to stand, would be to render unlawful the exercise by the complainant of its rights under this contract.

## XII.

*There is jurisdiction in equity.*

Resort to equity is proper, because of the cloud upon the complainant's title, to avoid a multiplicity of suits, to prevent interference with necessary extensions, and because damages at law would be clearly inadequate.

*Blair vs. Chicago*, 201 U. S., 400-449.
*Detroit vs. Detroit Citizens R. Co.*, 184 U. S., 368.
*Cleveland vs. Cleveland City R. Co.*, 194 U. S., 531.
*Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S., 65.
*Iron Mountain R. Co. vs. City of Memphis*, 96 Fed., 131.
*Omaha Water Co. vs. City of Omaha*, 147 Fed., 1.

## ARGUMENT.

### I.

*For forty years commencing with the enactment of the Turner ordinance the city consistently construed the contract to be without limit as to time.*

Because they have a material bearing upon the proper construction of this Turner ordinance we desire to call attention to some of the circumstances attending its enact

ment, to the facts disclosed in connection with the controversy between the two companies and the city which commenced in 1886 and resulted in the reorganization of 1889, and to the occurrences after January 1, 1898, the date when the city now claims that the grant under this ordinance terminated.

(a) *The Circumstances Surrounding the Enactment of the Ordinance.*

Section 4617 of the Code of Iowa is as follows:

> SEC. 4617. Understanding of parties to agreement. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

This has been the law of Iowa since 1850. See
*Code of Iowa*, 1850, section 2401.
*Revision of* 1860, section 3993.
*Code of* 1873, section 3652.

One of numerous cases illustrating the application of this section is
*Evans vs. McConnell*, 99 Iowa 326.

Mr. J. S. Polk prepared the original draft of the Turner ordinance. He was for many years a member of the bar of this court, and was one of the original stockholders in the Des Moines Street Railway Company. He, however, disposed of his interests shortly after its organization, and had no further interest in the company until he acquired it in 1889 in connection with the consolidation. From that time he retained an interest, until his death in 1907.

Mr. Polk was a witness in this case. On page 451 of the Transcript he says:

> The whole ordinance was gone over with in the presence of the council, sitting as a council, and in

> the presence of the committee, and it was understood by them, and insisted upon by myself as attorney for the stockholders, that the franchise would not be accepted, unless it was perpetual and exclusive. I insisted on an exclusive franchise for sixty years; that matter was discussed fully at quite a number of the meetings, and *it was finally agreed that we would take a perpetual franchise with an exclusive feature for thirty years, and that was embodied in the ordinance.*

He says in support of these contentions it was urged (Transcript, p. 451)

> that it was an experiment as to whether street cars would be remunerative in Des Moines. The city was then a small village, sparsely settled, and unless we could get a franchise that would be exclusive for a period of time that would enable us to get back our investment, we refused to have anything to do with it. The town was then, I would say, not over 5,000 people, and while we all were ambitious and had great hopes for the future, we did not know whether these hopes would be realized or not, and we did not want to, and in fact refused to put the money into it necessary to build the road, unless we had a guaranty that we would have control of the situation for the length of time that would enable us to get back our investment.

This testimony is not contradicted by any one.

A fact of great importance appears from the testimony of Mr. Polk at pages 452 and 453. As a basis for the Turner ordinance, there had been obtained a copy of a street railway ordinance enacted by the city of Indianapolis, January 18, 1864. This was taken as a model, changes being made in order to make it conform to the agreement between the company and the city of Des Moines. A copy of this Indianapolis ordinance was furnished to the city council while the negotiations were pending (Transcript, p. 454) so that

its attention was directly called to the changes made and their purpose. Mr. Polk says (Transcript, p. 454):

> I meant to say that the clause in the Indianapolis ordinance was changed so that it gave us a perpetual franchise, and an exclusive franchise for thirty years and this change was adopted and agreed upon by all of us and inserted in the Turner ordinance, which was finally passed.

He says further, on page 455:

> Int. 32. So that, if I understand you correctly, what you told the council you had done and intended to do, was to modify the Indianapolis ordinance, so as to make it perpetual and exclusive for thirty years, and they assented to that?
>
> Answer. That is what I told them, and very emphatically, and they assented to it finally.

The Indianapolis ordinance was offered in evidence in this case, and is Exhibit "12." Transcript, page 75. *A comparison of the portions of the two ordinances material to this question shows that the change made was to eliminate from the Indianapolis ordinance the part of it which limited its grant to thirty years.* We print in parallel columns section 15 of the Indianapolis ordinance (Trans., p. 80) and this section as it appears in the Turner ordinance (Trans., pp. 20 and 21):

| *Section 15, Indianapolis Ordinance.* | *Section 10, Turner Ordinance.* |
|---|---|
| The right to operate said railway *shall extend to the full time of thirty years from the passage hereof*, and the said city of Indianapolis shall not, during all the time to which the privileges hereby granted to said company shall extend, grant to | The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after |

| | |
|---|---|
| or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to the said company. | the expiration of said term, grant to or confer upon any person or corporation, any privileges which will impair or destroy the rights and privileges herein granted to said company. |

It will be noted that the words in the Indianapolis ordinance, "extend to the full time of thirty years from the passage hereof," which are the words limiting the grant in that ordinance to thirty years, are omitted, and in lieu thereof, there are inserted in the ordinance now under consideration, the words: "shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon."

The city of Indianapolis agrees not to grant privileges which will impair or destroy the rights and privileges granted in its ordinance *"during all the time to which the privileges hereby granted to said company shall extend;"* while in the Turner ordinance, this is modified so as to provide that the city of Des Moines shall not, *until after the expiration of the exclusive term*, grant any such rights or privileges to others.

The Indianapolis ordinance granted an exclusive right limited to the term of thirty years. If it had been the purpose to grant such a right by the Turner ordinance of December 10, 1866, no change in this part of the Indianapolis ordinance would have been made, because it could not have been made without defeating that purpose.

The Indianapolis section contained apt language for a thirty-year exclusive grant. The fact that these changes were made demonstrates that the purpose of the parties was to make the grant different from that in the Indianapolis ordinance, and that *the change intended was to strike out the limit upon the term of the grant.*

The testimony of Dr. Turner, who first owned the property (Transcript, p. 456) shows how well founded the fear

was that for many years the property would prove wholly unremunerative.

Mr. Polk's recollection as to the original transaction is entirely corroborated by an addition which he made to the opinion given by Mr. Galusha Parsons as to the duration of the rights under this ordinance. This opinion was given prior to July 1, 1886, to the gentlemen who were then negotiating with Dr. Turner for the purchase of the property (Transcript, p. 458) and was submitted to Mr. Polk for his judgment. At this time, Mr. Polk had no interest in the property. He appended to the opinion of Mr. Parsons the following written statement:

> I drew the ordinance in question and know that the intention was to give the street railway company a perpetual right in the streets which should be exclusive for thirty years. I therefore concur in the conclusion reached by Mr. Parsons above.
>
> (Signed) J. S. POLK.

This entirely accords with the present testimony of Mr. Polk as to the circumstances which surrounded the enactment and acceptance of this grant.

### (*b*) *The Period from* 1886 *to* 1889.

For about twenty years the Des Moines Street Railway Company, controlled by Dr. Turner, operated the property. July 1, 1886, the property was acquired by the Des Moines Street Railroad Company (Transcript, pp. 102, 103, and 104). June 29, 1886, the city granted to a competing company, the Des Moines Broad Gauge Street Railroad Company (succeeded by the Des Moines Electric Railway Company) the right to construct and operate a street railroad in certain specified streets. The first broad gauge ordinance is Exhibit "106" (Transcript, p. 96).

Work was commenced under this ordinance at once. Immediately there arose a bitter controversy between the old

company, its tracks being narrow gauge, and the new or Broad Gauge Company, and the city. This controversy was attended by many enactments of the city council, and ended only with the consolidation in September, 1889. Throughout this controversy the duration of the non-exclusive grant in the Turner ordinance was treated as unlimited, notwithstanding the intense and bitter feeling which the controversy at once engendered and which was maintained during this period. Note the testimony of Mr. McCain, the president of the Des Moines Street Railroad Company, that he was arrested seven times in one day (p. 587).

It will also be remembered that during this period the litigation was pending between the city and the Des Moines Street Railroad Company (Record, p. 119), in which the decree set out on page 5 of the record was rendered by the Supreme Court of the State; and also that during this period the city brought its action to cancel the ordinance in question (Record, p. 164); and that also at this time the Street Railroad Company had an action pending for damages.

In the case of the

> *Des Moines Street Railroad Company vs. City of Des Moines*, 73 Iowa, 513,

it was held that the Turner ordinance constituted a valid contract, and the decree to which we have referred was entered enforcing it against the city by permanently enjoining the city from interfering with the company in making extensions; and in the case of

> *Des Moines Street Railroad Co. vs. Des Moines Broad Gauge Street Railroad Company*,

submitted with the case just referred to and decided by the same opinion, the exclusive feature of the ordinance was sustained and an injunction was granted against the Broad Gauge Company. After the elaborate and thorough investigation of the questions which the trial of these cases had involved the city, through its counsel in this suit against it,

in a formal proceeding in court, in print, deliberately and not inadvertently or carelessly, stated its construction of this ordinance in a petition for rehearing in the following language, which is quoted from page 677 of the record:

> But passing this consideration, we assume that no ordinance of this kind is valid unless it is in accord with the public interests and sound public policy—in other words, an ordinance in violation of public policy is unreasonable, and we urge the following considerations that enter into this question, and should receive the careful consideration of the court in determining it:
>
> 1. *It gives to the plaintiff company the right to perpetually occupy all the streets and alleys with single or double tracks of street railway, and requires that they shall be operated by animal power only. There is no limit of time upon this right.* Upon the record in this case it is made apparent that there are but few, if any, of the streets that will bear more than a double track of street railway without injuring if not destroying its use for other legitimate street purposes. In its opinion, the court has evidently overlooked this fact and the case is, the court is treated as though the grantee's right in the streets were limited to thirty years, but the grant is contained in the first section, and is as sweeping as language can make it. *The only limitation upon this grant is contained in section* 10, *in these words:*
>
> *"The right herein granted to said company to operate said railway shall be exclusive for thirty years from the time the first mile of said track is laid and cars running thereon."*
>
> *This, we submit, only relates to the exclusiveness of the right, and leaves the company with its property interests in all the tracks, single or double, that it may have laid during this long term of years.* In view of the facts that it is the capital of a young and growing State—a city of large area, increasing seven hundred per cent in less than two-thirds of the time of the exclusive privilege alone, and the further fact that

> within this time all the available streets may in some portion be occupied by all the railway tracks that such streets can practically bear, so as to make the subsequent rights, though not exclusive in form, practically exclusive in perpetuity, are no small circumstances to be taken into account in determining whether this ordinance was reasonable, both as to the time of the exclusive privilege, and the grant in perpetuity beyond that time, though not in terms exclusive. Again, we urge in this connection, and the fact that the grant embraced all the streets and alleys of the city, and was to be exclusive for thirty years, makes the whole ordinance unreasonable.

Our statement that the expressions of this petition for rehearing were the deliberate expressions of the established attitude of the city with reference to this matter is confirmed by the deposition of Mr. Baylies, who was the counsel for the Broad Gauge Company at this time and who joined with the city in this petition for rehearing. We make excerpts from his testimony with reference to the Turner ordinance at pages 58 and 59. On page 58 he says:

> My construction of that ordinance at that time was: That it granted the rights given without limitation as to time, and made these rights exclusive for thirty years, and we urged before the courts that a grant of rights so broad, was unreasonable, and beyond the powers of the city council. The counsel representing the company holding under said ordinance also construed as granting a perpetual right, but differed from us as to the reasonableness of the grant. I believe that counsel representing the city were in accord with my views; as the utmost harmony existed between us, throughout the litigation, and I cannot recall any objection made to the construction stated.

On the next page he says further:

> I have no recollection now, of any one at any time preceding the consolidation of the companies in 1889, claiming or contending that the limitation of the ex-

> clusive right limited the general right of the company to occupy the streets, or that the general right was not perpetual. On the contrary, so far as I can now remember, the general opinion was that the ordinance granted the company the perpetual use of the streets, and made that right exclusive for thirty years.

The appellee was not organized until 1893. When it acquired this property in July, 1893, it acquired it upon the faith of this construction formally announced by the city seven years before, and consistently adhered to by the city for twelve years more, until the resolution of November 21, 1905.

Shortly after the enactment of the Broad Gauge ordinances and while the controversy between the old company and the city and the Broad Gauge Company was pending, the city attempted to modify the Turner ordinance and to that end passed the ordinance, Exhibit No. 39, which is set out on page 112. This ordinance in its title states that it is an amendment of the Turner ordinance. The significant part of this ordinance is to be found in section 11 (Record, p. 115), which we quote:

> SEC. 11. The right herein granted to said company to operate said railroad shall continue for the term of thirty years from the time the first mile of said track was laid and cars running thereon and no longer; provided, that nothing herein contained shall be construed to extend the rights of said company beyond the period of thirty years from the time the first mile of track was laid, nor to vest said company with any rights not now possessed under their original charter.

This is substituted for section 10 of the original ordinance. It changes that section by eliminating the exclusive feature, and by a limit of the grant of thirty years, demonstrating that the claim that the original section 10 imposed

this limitation is an afterthought, squarely opposed to the then construction of the contract by both parties to it. It also demonstrates that when the intent is to limit a grant to thirty years it is easy to express it.

This amendment was not accepted, and the city by abandoning it conceded its inability to force it upon the company.

October 12, 1886, the Des Moines Street Railroad Company filed its bill in the State court (Transcript, top of p. 469, and Exhibit "44," p. 119), setting up the Turner ordinance, the construction and operation of the road under it, the various re-enactments of it, the acquisition of the property by the Des Moines Street Railroad Company, and

> that with the increasing growth of the city comes the necessity for additional extensions of its lines of railway, not only for the purpose of accommodating the public with street railway facilities, but for the purpose of preserving the value of the plaintiff's property, and that without such right of extension the plaintiff's property would become valueless.

It also set up that an extension upon Sycamore street had been commenced, and that the mayor and city marshal were preventing the completion of this work. The prayer was that the city and its officials be enjoined from interfering with the extension referred to.

> and that the said defendants and each of them be restrained and enjoined from interfering in any way or manner *with any other of the extensions that may hereafter be projected by plaintiff.*

It is admitted (Transcript, p. 470) that the decree set out in paragraph 10 is the decree which the Supreme Court of the State entered in this case. After finding that the exclusive right of the plaintiff is for thirty years and that

it has a right to make extensions, the decree proceeds with the following language (Record, p. 51)

> It is, therefore, ordered, adjudged and decreed, that the defendants, the city of Des Moines, J. H. Phillips, mayor of said city, and V. H. Botkin, city marshal, and their successors in office, be and are hereby restrained from interfering in any way with the construction, extension or operation by animal power of the plaintiff's lines of street railway upon any of the streets of the city of Des Moines.

This injunction is absolutely unlimited as to time, though the limit upon the exclusive right is referred to. This decree was entered in the case in which the petition for a rehearing, which has already been referred to, was filed.

We submit that the decree limited that the right, as well as the parties, restricted that right to an exclusive feature to be [illegible]. The decree was entered [illegible] Supreme Court of the State [illegible] and was [illegible] and overruled. It [illegible] the opinion that the exclusive [illegible] of the [illegible] and [illegible] the exclusive right [illegible] the [illegible] to be [illegible] The [illegible] and [illegible] [illegible] [illegible]

tric road did not infringe the exclusive right. Shortly thereafter and on May 24, 1888, the city council adopted a long indictment of the narrow gauge company, concluding with resolutions attempting to forfeit its rights under the Turner ordinance, and instructing the city solicitor to enforce the forfeiture (see Exhibit "60," p. 147). We quote part of it from the bottom of page 149:

> That the Des Moines Street Railway Company and its successors, the Des Moines Street Railroad Company, has by its repeated violations of the expressed and implied obligation of *its contract with the city of Des Moines, of December 19, 1866*, and subsequent amendments thereto in the particulars above stated and its repeated violations of the reasonable police regulations imposed upon it by the ordinances of the city of Des Moines heretofore named in the particulars above specified, forfeited its rights and privileges *under said contract* and released the city of Des Moines from its obligations under said contract.
>
> Resolved further that the *rights and privileges and exclusive right* of the Des Moines Street Railroad Company under its contract with the city of Des Moines to construct and operate street railroads by animal power upon all streets and upon all parts of streets in said city be and the same are hereby declared forfeited by the wrongful acts and misconduct of said company as hereinbefore stated, as well as for other acts and omissions not herein enumerated, and the city shall and does hereby renounce and rescind said contract and resumes all its original rights in and on each and all said streets and parts of streets used or occupied by said railroad company to the same extent as though said contract with said company had never been made.

Note that this resolution refers to a double grant, the rights and privileges *and exclusive right* of the Des Moines Street Railroad Company under its contract with the city. It is inconsistent with the present contention of the city

that the Turner ordinance granted only an exclusive right and included no other rights and privileges.

Following this up, on May 29, 1888, the council again arraigned the company and attempted again to declare a formal forfeiture. This resolution, omitting the details as to the alleged shortcomings of the company, is as follows (Transcript, p. 151):

> 1st. The council finds that the original ordinance granting the Des Moines Street Railway Company the right to construct and operate its lines of railway upon the streets of Des Moines was passed December 10, 1866, and an amendment thereto February 5, 1872.
>
> That by an ordinance passed September 14, 1886, the first named ordinance and its amendments were repealed and said company granted certain rights and privileges not necessary to enumerate here.
>
> 2d. The council further finds that said railway company and its successor have not only openly and publicly repudiated the ordinance of 1886, but have failed to conform thereto in many substantial and reasonable particulars and have continuously claimed and now claims that said ordinance was void and of no effect and that the said ordinance of 1866 with its amendments was and is in full force and obligation.
>
> 3d. The city council without admitting the invalidity of the ordinance of 1886 or recognizing the pretended rights of said company under said original ordinance has examined the construction of the line of railway and the long continued conduct of the company and its successor and compared the same with the requirements of said last mentioned ordinance and amendments, and thereupon finds that the said company and its successors have failed, neglected and refused to perform the conditions thereof or to comply with reasonable requirements therein prescribed in many respects, among which are "A." They have not constructed their railways upon the bridges used by them as required by section nine (9) of said ordinance. * * *
>
> 4th. The council further finds that by reason of the aforesaid violations of the said ordinance and

their duties imposed thereby on the part of the Des Moines Street Railway Company and its successor, the said Des Moines Street Railroad Company, the said last named company has forfeited al rights, privileges and franchises granted by said ordinance and amendments, and that the city has the right to annul the contract arising therefrom and repeal the same, and that the public good requires that said contract be forfeited and annulled, and the ordinance and amendments repealed if the same be now in force and effect.

5th. The council further finds that it would be inequitable and unjust, notwithstanding such repeated violations to deprive the said railroad company of the use of the streets so far as they are reasonably necessary to enable said company to operate the system now being operated by it, and to utilize all the property connected therewith. That therefore an ordinance should be passed granting such franchise to said company, its successors and assigns, and that the resolutions hereto appended should not be operative until the passage and approval of an ordinance having such object in view—

Therefore, Be it resolved by the City Council of the City of Des Moines—

That all the rights and privileges of the Des Moines Street Railway Company or of its successor, the Des Moines Street Railroad Company, granted or confirmed by the said ordinances of December 10, 1866, and its amendments or by the ordinance of September 14, 1886, are hereby forfeited and declared to cease and determine, and that the contract created by said ordinances and each of them be and the same is forever annulled and cancelled—*This resolution shall take effect upon the passage of an ordinance having for its object and purpose the granting of the right to the Des Moines Street Railway Company, its successors and assigns to use such streets as are reasonably necessary for the operation of its present system of service under such reasonable regulations as may be prescribed*—.

Be it further resolved that in the event of a failure of said Railway Company to accept the ordinance last mentioned if it shall be passed and approved within

> the time therein specified, the city solicitor is hereby authorized to institute such proceedings as he may determine to be necessary to give effect to and enforce the forfeiture herein declared, and he is further empowered to employ such additional counsel as he shall deem expedient. Be it further resolved that the mayor be instructed to cause a certified copy of these resolutions to be served upon the said Des Moines Street Railroad Company within three days after their adoption and approval.

It appears that a true copy of these resolutions (Transcript, p. 153) was served on the company on the 1st of June, 1888.

Note the provision which we have italicized—that the resolution is to take effect upon the passage of an ordinance granting to the company the rights necessary for the operation of its then system. What the city considered such an ordinance was passed. It is Exhibit "62," Record, page 154. The significant thing about this ordinance is that while it omits the exclusive feature of the ordinance of 1866, *the general right granted is unlimited as to time.* It limits the company to the streets then occupied and to such as the council might thereafter authorize. It strikes out the exclusive right contained in the Turner ordinance, but it does not attempt to impose any time limit upon the grant. It is utterly impossible that this city council, under the circumstances which this record shows then existed, after two years of bitter controversy, would have voluntarily offered to the Des Moines Street Railroad Company what, if the city's present position were sound, would have amounted to an indefinite extension of the duration of its rights in the streets. It will be noted later that this ordinance contained the words "and for the time" upon which counsel hang their entire contention. The force of what had been the accepted construction of this Turner ordinance for twenty-two years was then such as to compel this hostile council, in an atmosphere of extreme antagonism to the then holder of the grant, and

while it was granting only twenty-five year rights to the Broad Gauge Company to accept the construction of the grant as permanent and to offer a permanent non-exclusive right to the company. The record could not show a more positive and conclusive concession of the correctness of our contention that at this time the city and the company agreed in construing this grant as permanent.

The situation in Des Moines became intolerable. The city, the Broad Gauge Company and the Narrow Gauge Company were the principal factors in the street railroad war. The three or four relatively small companies were practically non-combatants. The controversy became so active that Mr. McCain, one of the officers of the Narrow Gauge Company, states that on one day he was arrested seven times (Transcript, p. 587). The service was intolerable. In some places there were three tracks in a single street; in one instance, perhaps four (Transcript, p. 588). To make a trip of any considerable distance it was necessary to use two or more lines, walk from one line to another, wait for cars and pay several fares (pp. 597-600).

Under these circumstances, the city officials as well as private citizens requested Mr. J. S. Polk, then interested in two of the smaller companies, to, if possible, bring about a consolidation that would end this controversy and create a situation where the public might expect reasonably good service. At this time the Broad Gauge Company had an electric right in the streets, originally granted for the term of twenty-five years and not quite two years old. This ordinance is Exhibit "27," Record, page 138, and was passed December 20, 1887. The Turner ordinance was passed in 1866, and if it was a grant for but thirty years, its unexpired term was but little more than eight years. Mr. Polk says, at page 602:

> I finally promised the city council to make an effort to bring about a consolidation of the various companies, and to that end entered into negotiations with the Des Moines Street Railroad Company, the Des

Moines Electric Railway Company and the Des Moines and Sevastopol Railway Company, which resulted in an arrangement by which myself and associates were given the right to acquire an interest in the Des Moines Street Railroad Company, and by which it acquired options upon the property of the Electric Company and the Sevastopol Company.

In this connection, Mr. Polk testified further:

Q. At that time you were solicited by the citizens and the mayor and city council to undertake a consolidation of the several street railways of the city, as you have stated, what knowledge and information did you have with respect to the Turner franchise—its provisions, the character of the franchise with respect to its being perpetual, the opinions of attorneys with respect thereto, and the opinions of the representatives of the city, and the mayor and city council in that respect? State fully.

A. I was familiar with the Turner franchise and knew that it had an exclusive grant that would not expire until January 1, 1898, *and I know further that the general right granted by it was perpetual.* I was not only familiar with the ordinance itself, *and the circumstances that had attended its enactment*, I was *also familiar with the opinion of Galusha Parsons*, that had been introduced in evidence, and I *further knew that the construction that I had placed upon this ordinance with respect to the perpetual character of the franchise had been placed upon it by the city in the litigation with the Des Moines Street Railway Company, which had terminated before the transactions of which I am now referring. I also knew that this construction of the ordinance was entertained by Judge Bailies, who represented the Broad Gauge Railway Company, and by Hon. A. B. Cummins, now the governor of the State of Iowa, who was then the special counsel for the mayor of the city, in the matter.*

I also knew and it is a fact, that in all the controversies between the city and the Des Moines Street Railroad Company, and the Broad Gauge Company,

which had culminated in the litigation between the city and the Des Moines Street Railroad Company and between the Des Moines Street Railroad Company and the Broad Gauge Company, and in the controversies and discussions that grew out of the street car situation in Des Moines, *it had never been questioned, but that the Turner franchise was perpetual except as to its exclusive feature*, expiring January 1, 1898; *no claim was ever made to the contrary.* Judge Baylies, representing the Broad Gauge Company, and James H. Deitrick, the city solicitor, in a printed argument filed in the Supreme Court, between the city, the Des Moines Street Railroad Company and the Broad Gauge Company, made statements to that effect, which are introduced in evidence.

As I stated, I was familiar with the accepted view with respect to the Turner franchise being perpetual and acted upon the assumption that it was perpetual throughout the negotiations with the city, respecting the consolidation, and at all times afterward in the reconstruction and development of the system.

Q. What, if any, requirements did you impose upon the city on behalf of yourself and associates, as to the conditions upon which you would undertake the consolidation?

A. The Des Moines Electric Railway Company had a franchise granted by the city, authorizing the use of electricity, but the franchise was limited in time and would expire twenty-five years from December 20, 1887. *Throughout the negotiations [illegible] with the consolidation of the city, [illegible] respect to the consolidation, I had stated that I would not have anything to do with the matter unless all questions as to the legality and validity of the Turner franchise were eliminated and [illegible] settlement of the suit brought by the city to cancel and annul such franchise, to which I have already referred. And I also stated, that I would not undertake it under a franchise for the use of electricity, that was not also perpetual.*

The city, on its part, desired especially to limit the rights of the company so that parallel tracks should not be nearer

than two blocks, and in the negotiations the perpetual feature of this grant was urged as an inducement to Mr. Polk's acceptance of this suggestion (Transcript, p. 604).

The negotiations continued until a meeting of the city council held upon the evening of the day when the options held by Mr. Polk were to expire. Mr. Polk testifies (Transcript, p. 605):

> Mr. Cummins, as well as other representatives of the city, strongly urged the necessity of the restriction as to the right to use and occupy parallel streets, and the reasonableness of the demand for the concession was based upon the statement, that inasmuch as the Turner franchise conferred a perpetual right, the city, as a condition of consenting to the consolidation, was entitled to the restrictions provided for by the resolution.
>
> As above stated, the city had granted to the Des Moines Electric Railway Company, the right to use electricity as a motive power for a limited period. It was the purpose to electrify the entire system, and I had stated to the representatives of the city that I would not go into the matter unless the right was conferred. I was not satisfied or willing to do so under the limited right granted to the Electric Railway Company, and at the meeting stated to the representatives of the city *that I required not only that the suit brought to cancel the Turner franchise be settled so as to remove any question of the validity of that franchise, but also the right to use electricity as a motive power should be granted without limit as to time, so that such right should also be perpetual.* Accordingly my demand with respect to the right to use electricity as a motive power was embodied in a second resolution, which now appears as Sec. 1340 of the revised ordinances of 1900, also introduced in evidence.
>
> Q. What conclusion was finally reached?
>
> A. After a session of the council, continuing until nearly midnight, I yielded to the requirements on behalf of the city, and the city yielded to my requirements and the council passed the two resolutions to

which I have referred, and they were approved and signed by the mayor. As soon as this was done, I elected to purchase under the options which I held, and that night, and before leaving the council room, paid the first $10,000 of the purchase price.

The resolutions adopted at this meeting as the result of this negotiation, upon the faith of which the first payment was made under the options at this meeting and the system was thereafter consolidated under the Turner ordinance, are set out on pp. 195-197 of the record. They recite the pending negotiations for consolidation and provide:

1. That as an inducement to it, and in the event of the consolidation of the Narrow Gauge Company, the Electric Broad Gauge Company and the Sevastopol Company, so that they shall be operated under one management, the city will dismiss its suit to cancel the Turner ordinance.

2. That the company operating the consolidated property shall accept such modification of its existing franchises as will require it, within a reasonable time, to adjust its systems of tracks, so that parallel streets shall not be occupied nearer than two blocks apart, no existing tracks to be taken up without permission of the council and not more than two tracks to be laid upon any street.

3. That consent, permission and authority is granted to the consolidated company to operate its road by electricity or other practical motive power.

These resolutions were accepted in writing (Exhibit 128, p. 197) by the Des Moines Street Railroad Company, the holder of the Turner ordinance, as the consolidated company. October 1, 1899, the Des Moines Electric Railway Company (Transcript, pp. 198 and 200) and the Sevastopol Company (Record, p. 210) conveyed their property to the Des Moines Street Railroad Company effecting the consolidation. The work done in transforming the property into a system is indicated by the map Exhibit "C," which is explained by the testimony on page 535. The various prop-

erties were connected; tracks which were duplicates were taken up; extensions were made; the narrow gauge tracks were broadened; property was purchased and the erection of a new power plant was commenced in 1890 (Transcript, p. 537). Practically all of the old material was useless, and the road had to be rebuilt. New equipment also was purchased (Transcript, p. 538). March 8, 1890, the city passed an ordinance amending the Turner franchise in accordance with the consolidation resolutions. This ordinance made the following changes:

(*a*) The use of electricity was authorized.

(*b*) Tracks on parallel streets nearer together than two blocks were prohibited without the consent of the city council.

(*c*) The removal of tracks then existing was prohibited without the consent of the city council.

(*d*) The rate of fare authorized by the ordinance was reduced to five cents.

(*e*) Some changes were made in the rules as to the operation of the cars.

By an act of the legislature of Iowa (Transcript, p. 218) the Turner ordinance as thus amended to authorize the use of electricity was legalized.

This was all in pursuance of the negotiations between Mr. Polk and the city of Des Moines which resulted in his undertaking the consolidation of these properties. The testimony, which shows that this consolidation was undertaken and completed upon the faith of the construction of this Turner ordinance which had been accepted for twenty years, is absolutely uncontradicted. Upon the faith of this construction, the city induced this investment. The only possible explanation of Mr. Polk's insistence that the validity of the Turner ordinance should be recognized and that the right to use electricity under it should be granted is that the consolidated property was to be acquired, rehabilitated, and operated under this franchise; and it goes

without saying that no one would have undertaken this upon a right to expire within less than nine years.

To recapitulate some of the salient facts with reference to this consolidation:

(1) Mr. Polk knew the facts as to the enactment of the Turner ordinance, and knew the actual purpose to make the grant unlimited.

(2) Mr. Polk knew that by all concerned—the city, the Narrow Gauge Company and the Broad Gauge Company—the grant was in fact construed as unlimited.

(3) Mr. Polk knew that in the petition for rehearing filed by the city, it had formally construed this grant as unlimited.

(4) Mr. Polk knew that in the ordinance of June 1, 1888 (Exhibit 62, p. 153), where the city attempted to repeal the Turner ordinance and to enact an ordinance which would confirm the rights which it conceded to the company, the grant was unlimited.

(5) Mr. Polk knew that in the suit by the city brought in July, 1888, to enforce this attempted forfeiture (Exhibit No. 67, p. 164) there was not a suggestion that this grant was limited, and knew that in its petition in that case the city alleged with reference to the unlimited ordinance, Exhibit No. 62, "*that by the passage of said ordinance it secured to the said railway company every just right*, in view of its repeated violations of the former ordinance, *to which it was or is entitled*" (p. 166).

(6) Mr. Polk knew that the Turner ordinance did not grant an electric right, and that if it was for a thirty-year term, it had only about eight years to run.

(7) Mr. Polk knew that the broad gauge ordinance granted an electric right, and that twenty-three years of its twenty-five year term remained.

(8) Mr. Polk demanded, as a condition precedent to the investment incident to acquiring the broad gauge and Sevastopol properties and rehabilitating the consolidated property, that the city authorize the use of electricty under

the Turner ordinance, and that the suit assailing its validity its twenty-five-year term remained.

(9) The city passed its resolutions (Record, p. 195, *et seq.*) reciting the pendency of these negotiations and stating that "as an inducement to such consolidation," if the consolidation is effected, the city will dismiss this suit upon the further conditions that the Narrow Gauge Company's suit for damages be dismissed, and that the existing franchises be modified so as to prevent parallel tracks nearer together than two blocks except by permission of the city (Record, p. 195).

(10) The city further provided in these resolutions (Transcript, p. 197):

> Whereas, negotiations are now pending for a consolidation of the different street railway companies of the city, and it is believed that the general welfare of the city will be promoted by such consolidation, therefore as an inducement to said consolidation be it resolved, That in the event of a consolidation being effected between the Des Moines Street Railroad Company, Des Moines Electric Railway Company, and the Des Moines Suburban Street Railroad Company, so that said consolidated roads shall be operated under one management, that consent, permission and authority is hereby granted to said consolidated company to operate its railroad now or hereafter constructed by electricity or other practical motive power.

(11) These resolutions were formally accepted by the Des Moines Street Railroad Company (p. 197).

(12) They were effectuated by an ordinance which amended the Turner ordinance, demonstrating that this was the ordinance under which it was anticipated the consolidated properties would be operated (Exhibit 10$\frac{2}{2}$, p. 215), and this was confirmed by legislative enactment.

We submit that this record amounts to an absolute demonstration that the parties to this negotiation united in the belief that the Turner ordinance was not to expire in eight

years. It is utterly incredible that both of these parties should have been solicitous about the terms of the Turner ordinance and about the provisions of the amendment to it, and should have been indifferent as to the broad gauge electric ordinance if the latter had about three times as long to run as the former. It is impossible that Mr. Polk should have contemplated the consolidation of this property under a right having but eight years to run, and it is equally impossible that the city should have anticipated that either he or any one else would make such an investment upon that basis.

(*c*) *From 1889 to 1898.*

From 1889 down to the time that the resolution in controversy was passed, the city recognized the construction of this contract which had theretofore been adopted.

It is contended by counsel that after 1897 a new contract could not be made by implication, because it is said that a vote of the people was necessary in order to validate any new grant made at that time.

This is not the question that is presented here. It is not the contention of the appellee, so far as the Turner ordinance is concerned, that a new contract has been made since the amendment of March, 1890. Our contention is that the acts of the parties, the contemporary construction, and the enactments of the city, which are in *pari materia*, all tend unequivocally and with overwhelming force, to the conclusion that this contract as originally made and as construed for forty years, was a grant without limit as to time. We do not contend that we have here an uninterrupted series of new grants. We do contend that there is an uninterrupted series of transactions which demonstrate beyond room for controversy what the original true meaning and intent of the parties was.

1893, August 3d, the city solicitor and a committee of the council made a report touching the question of the liability



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of the company for paving upon what is called the Walnut Street bridge. In this report reference is made to the resolutions of September 5, 1889, and to the ordinance of March, 1890, passed in conformity with them. In connection with the fact that there were parallel tracks here less than two blocks apart, it states (Transcript, p. 221):

> It will be seen therefore that this street railway has the right under the existing contract to operate its road on Walnut street, including the bridge thereon, without asking permission from the city council.

This report and the action of the council immediately following it are based upon the proposition that the parties were governed by the Turner ordinance as modified in connection with this consolidation, and especially by the compromise as to parallel streets.

1893, July 17th, the council passed a resolution (Ex. 111, p. 224) authorizing an extension of the track along Mulberry street from West 5th street to West 7th street, and thence north along 7th street to West Walnut street, providing that the tracks were to be laid and operated "in accordance with the ordinance of the city of Des Moines heretofore granted to it and its assignor, *the Des Moines Street Railway Company.*" There is but one ordinance that fills this description, namely, the Turner ordinance. Mr. Hippee testifies that under this resolution the tracks were built. By reference to the map marked Exhibit "B" it appears that these tracks parallel other tracks within a block of them, so that this resolution was necessary under the ordinance of March 8, 1890.

1893, July 24th, the resolution Exhibit 112, p. 225, was passed, authorizing the removal of a track, this being in conformity with the ordinance of March 8, 1890, which provided that no tracks should be removed without the consent of the city council.

In 1893 the present company was organized, and acquired not only the property of the Des Moines Street Railroad Company, but also the property of the other companies which had been operated after 1889 in connection with the Des Moines Street Railroad Company, so that in 1893 the entire property came under a single ownership as well as a single management.

*(d) Transactions After January 1, 1898.*

1895, February 4th, the city enacted an ordinance (Ex. 151, Tr., p. 292) granting to the Des Moines City Railway Company certain rights as to freight as well as to express and mail. The freight right was unlimited as to time. Section 8 of this ordinance was as follows:

> Nothing in this ordinance contained shall be so construed as to extend the charters of any of the companies operated by the Des Moines City Railway beyond the time as fixed in their original charters and if the charters of any of the said companies expire before eight years, then all rights granted by this ordinance shall also expire at the same time.

The contention on the part of counsel for the appellant, that this ordinance amounts to a construction of the Turner ordinance as limited to thirty years (Appellant's Brief, p. 117) is based upon an entire misapprehension of the situation. This eight-year period terminated February 4, 1903. The thirty-year period of the Turner ordinance expired January 1, 1898. On July 11, 1903, after this eight-year period had terminated, this freight ordinance was amended (see Ex. 198, p. 333) by changing some of the streets over which freight might be carried, and by an express grant found in section 5, authorizing the Des Moines City Railway Company to operate interurban cars over all

of its tracks, expressly including the tracks upon the streets not described in the freight ordinance.

When the original freight ordinance and the amendment to it are taken together, and it is borne in mind that this amendment, which treated the freight right as existing and confirmed it for the future, changing only the designation of the streets, and which further granted interurban rights in all the streets, was enacted after the first day of January, 1898, this freight ordinance as amended, instead of sustaining the contention of counsel for the appellant, shows clearly that the city did not by this ordinance take the position that the rights of the appellee terminated on January 1, 1898. If the Turner ordinance had expired January 1, 1898, the rights under the freight ordinance (Ex. No. 51) would have thereupon terminated and there would have been nothing left to amend in July, 1903. By this amendment, enacted something over five years after it is now claimed that the Turner ordinance had expired, the city expressly negatived the claim that the Turner ordinance expired during the eight years after February 1, 1895, and by its interurban grant covering all the streets, affirmatively recognized the existing right of the Des Moines City Railway Company to operate its street cars.

Note in passing that the city in receiving and placing on file the acceptance of the freight ordinance on February 4, 1895, recites that the company built the wall that was part of the consideration for this ordinance (Ex. 152, p. 296).

The exclusive term under the Turner ordinance expired January 1, 1898. Within about five months, July 6, 1898, the city passed a resolution (Ex. 156, p. 298) which recites that in consideration of the agreement of the company to construct a certain track, the city will bring Jefferson street to the established grade, and will also relieve the company of any obligation to operate cars over this track

ien such operation is unnecessary. This resolution is solutely inconsistent with the contention that when it s enacted the company's rights had terminated. This ck, about 1,300 feet, was built in July, 1898 (Record, 555).

1898, November 3d, the company was directed by resolu- n (Ex. 157, p. 298) to lay certain track, with its center teen feet from the west line of Twentieth street "and in ier respects to conform to the ordinance regulating the et railways *now in force*." This is inconsistent with suggestion that there was no ordinance then in force horizing any track. The provision in the resolution re- iring conformity in other respects with existing ordi- nces is referable to the requirement of the ordinance of rch 8, 1890 (Transcript, p. 246) which required the cks to be laid so as to leave "as much room on either side roof as practicable," an exception being made as to this vision in the case of the track referred to. This track was lt in accordance with this resolution and was about 4,200 long (Transcript, p. 555).

899, March 28th, the city, after negotiations with the pany as to what fenders were most efficient, passed a olution directing the company to equip its cars with ders, and the fenders were installed (Transcript, p. 555). ere was no other company to which this resolution could e applied, and the date of this resolution was something a year after it is now claimed that the rights under this nance expired.

Ir. William H. Baily, counsel for the city, was em- red by the city in the year 1899 to prepare a revision he ordinances of the city which were then in force. On ember 14, 1899, he submitted his draft of this revision cord, p. 390), stating in his letter submitting the draft: is revision contains all ordinances *now in force*, as well etc. By a resolution adopted upon the same day (Tran-

script, p. 391) the city council adopted this revision, and ordered its publication in book form. Title 13 of this book commences on page 400 of the Transcript, and is the title covering street railways. Chapter 2 of this title, commencing on page 402, is the Turner ordinance. It is immediately followed (p. 406) by the amendatory ordinance of March 8, 1890. The consolidation resolutions, passed September 5, 1889, appear at page 414, and are the only street railway resolutions, as distinguished from ordinances, considered of sufficient importance to have a place in the revision. The city could not have more formally recognized the Turner ordinance as in force in 1900, some two years subsequent to the date when the city now contends that it expired. The reason for inserting the Turner ordinance in this revision was that it was then in force, and because the company was then operating under it as amended by the ordinance of March 8, 1890, pursuant to the consolidation resolutions of September 5, 1889.

It will be remembered that this re-enactment was not the first re-enactment of this Turner ordinance. This ordinance was re-enacted in 1869 as No. 28 of the revision of that date (Record, p. 633). It was re-enacted again in 1874 as No. 31 of the revised ordinances of that date (Transcript, p. 637). It was re-enacted in 1879 as chapter 47 of the revised ordinances of that date (Transcript, p. 642). It was re-enacted again in 1889, as chapter 53 of the revised ordinances of that date (Transcript, p. 650). Finally came this re-enactment of 1900. In his work on damages, section 474, Sutherland says:

> But where the statute is re-enacted without change the presumption is strong that the legislature intended it should be the same construction that had previously been given it.

Again, in Sutherland on Statutory Construction (2 ed.), section 403, it is said:

> In the interpretation of re-enacted statutes the court will follow the construction which they received

> when previously in force. The legislature will be presumed to know the effect which such statute originally had and by re-enactment to intend that they should again have the same effect. The same rule applies to the re-adoption of a constitutional provision. It is not necessary that a statute should be re-enacted in identical words in order that the rule may apply. It is sufficient if it is re-enacted in substantially the same words. The same principle applies when a statutory provision is taken from a constitutional provision which has been construed.

In the case at bar, after in this petition of rehearing in 887 the city had formally construed this ordinance to be ermanent, after the Supreme Court of the State had granted s injunction without limit as to time, after the consolidaon, the city enacted the revisions of its ordinances of 1889 nd 1900. There is absolutely no room for question as to hat these re-enactments meant.

Following what we have quoted, *supra*, from section 403, he author says:

> The rule has been held to apply to the re-enactment of a statute which has received a practical construction on the part of those who are called upon to execute it.

In 1900, more than two years after the city now claims hat the grant under this ordinance had expired, after the ty had for over thirty years by its practical construction reated it as permanent, it re-enacted this ordinance as then force. There is no way in which the city could have more ositively and conclusively negatived the claim which its ounsel now assert, that this ordinance was not then in orce and had expired more than two years earlier.

Exhibit No. 175 is a resolution adopted on the 31st day f July, 1900 (Transcript, bottom p. 307). It refers to hanges in the central loop of the company (Int. 171, *et q.*, p. 556). This loop was the heart of the entire street

railway system, and was utilized by every car operated by the appellee.

1900, September 26th, a petition was filed signed by C. C. Nourse and others, asking for an extension of the 20th Street line, which extension was built. This track was an extension of a line from the center of the city to an outlying district. The extension was of absolutely no use either to the petitioners or to the company unless the other track could be used in connection with it. Judge Nourse, who headed this petition, is an eminent lawyer and a member of the bar of this court, and had resided in Des Moines practically since the granting of the Turner ordinance, and must have known the accepted construction of it.

1901, June 20th, the city council passed a resolution (Exhibit 178, Transcript, p. 311) in the following language:

> Resolved, That the Des Moines City Railway Company be, and it is hereby authorized, when it extends its tracks on East Walker street and Easton Boulevard, to build and maintain the same on the north side of said streets, so that the south rail of the said track as laid shall be two and one-half (2½) feet north of the center line of said street.

Note that this resolution recognizes the right to extend as existing, but authorizes the location of the tracks at one side of the street instead of in the center. The right to extend was not granted, because this right existed; but because section 6 of the Turner ordinance (Transcript, p. 19) required the tracks to be laid in the center of the street, special authority to lay the track on one side was necessary. This extension was built in 1901, and was about 7,240 feet in length (Transcript, p. 557).

The McKay ordinance, which contemplated the grant of other street railway rights to a competing company, was considered by the city (Exhibit 186, p. 315). It will be observed that this ordinance, which was filed on the 3d day

of February, 1902 (Transcript, top p. 322), carefully avoids any of the streets in which the Des Moines City Railway Company had its tracks. Its right to occupy these streets was tacitly recognized.

1902, April 4th, by ordinance, provision is made for straightening Seventeenth street (Exhibit 190, p. 324). The line was rebuilt to conform to this change.

1902, August 5th, an ordinance was enacted (Exhibit 191, p. 325) authorizing the use of certain tracks for a limited time for freight purposes.

1903, April 20th, the company proposed to rebuild some track upon Grand avenue west of Fourteenth street.

The evidence shows (p. 558) that at this time the company had a single track from Fourteenth to Seventeenth street on west Grand avenue; that it removed this track, replaced it by a double track, and upon the recommendation of the board of public works and the city engineer, repaved the part of the street occupied by its tracks with brick on a concrete foundation.

1903, April 27th, a resolution was passed (Exhibit 193, p. 328) requesting the City Railway Company to relay its tracks on Grand avenue between west Sixth street and east Ninth street with a single or double track, and pursuant to this resolution there were built 10,844 feet of track (Transcript, p. 559). There was a parallel track distant only one block, so that under the Turner ordinance as amended (but under no other ordinance) this resolution on the part of the city was necessary.

1903, June 15th, the city passed a resolution (Exhibit 199, p. 336) directing the board of public works to notify the company to pave the portion of east Walnut street, from Eleventh street to Eighteenth street, occupied by its tracks. On the same day it passed a like resolution as to pavement on east Twelfth street from Grand avenue to Washington avenue (Exhibit 200, p. 336). A similar resolution was passed August 3, 1903. Under the laws of the State of Iowa

the company had the right to pay the assessments for this paving in seven annual installments.

1903, August 17th, upon the petition of various citizens, the city required an extension of the west Fourth street line (Exhibit 202, Transcript, p. 337), and the extension which was about 1,700 feet long was built (Transcript, p. 560).

1903, September 8th, the city enacted an ordinance to prevent accidents at the waiting room (Exhibit 204, Transcript, p. 338). It appears (Transcript, p. 560) that the waiting room is the central station upon the loop of the appellee. All cars pass it, and as a consequence traffic at this corner is congested.

1903, September 21st, another resolution was passed pursuant to the amendment to the Turner ordinance, authorizing the construction and maintenance of certain tracks upon parallel streets less than two blocks apart (Exhibit 205, p. 339; also Transcript, p. 560, 561).

1903, November 17th, a resolution was passed reciting that a certain bridge was being constructed in the city and that the company expected to occupy it with its tracks upon its completion, and ordering that the tracks be built and poles and wires erected while the bridge was in course of construction, and prescribing the character of the poles to be used. These poles had been purchased (Transcript, p. 561) but had not been installed at the time the testimony was taken, because the work upon the bridge had not then progressed sufficiently.

Prior to that time, nothing but wooden poles had been used. Later, in co-operation with the city, iron poles were installed in a portion of the business district (Transcript, p. 561). See also the ordinance Exhibit 215, p. 346. Tracks were reconstructed so as to comply with the requests shown in Exhibits 216 and 217 (Transcript, p. 562). The company was permitted at its own expense to bring Madison Square avenue to a practicable grade between Fountain avenue and Summit street (Exhibit 218, p. 348) so that tracks could be laid across it (Int. 230, p. 562).

Practically all of the company's track has been rebuilt since January 1, 1898, the day when it is now claimed its rights expired. The company had on the 31st day of December, 1905, 76.49 miles of track. On January 1, 1898, it had 38.71 miles. After that date it built of new track 37.78 miles and rebuilt 25.925 miles of old track, so that of the 76.49 miles of track in existence on the 31st day of December, 1905, only 12.78 miles had been built prior to the time when it is now claimed that the rights under the Turner ordinance expired (Transcript, p. 540). During the same period the company made large improvements and additions to its power house, shops, equipment, etc. Mr. Hippee says, at page 563:

> Since that date the company constructed a new fireproof power building, in which are located two engines and two direct connected generators; each of these generators are 1,000 K. W. There is also in this same building a new boiler plant, consisting of 8-140 horsepower each water tube boilers, with the necessary stokers, pumps, pipes, fittings, condensers, and all different fixtures that go to make a complete and efficient power plant for the purpose of generating power for the operation of cars of this company and the Interurban Company. The old power plant was about 1,225 horsepower. The old engines and generators are maintained for use in emergencies. We also constructed shops of the size 137 x 252 feet. This building is two stories high, of brick; it is not of fireproof construction. It is what is called an improved slow burning construction. The building in which the shops are located is divided into a repair section in which cars are repaired and overhauled. The machine shops, in which the heavy iron working machinery is located, blacksmith shop, adjoining the machine shop, which is equipped with necessary machinery to furnish a complete blacksmith shop as an adjunct to the machine shop; the armature repair shop, in which all armatures and all electrical appliances used about the cars and machinery are repaired and overhauled. There is also located in this building a wood-working shop in which various pieces of

wood-working machinery are installed; this is used in repairing and rebuilding old cars and building new cars. We have facilities in these shops to build complete car bodies, new clear through. There is also located in these shops a paint department in which new cars are painted and finished completely, and the old cars are repainted, revarnished and renewed.

In the second story of this building is located the storehouse department in which the supplies that are used around the shops and power plant, line department, track department, and in fact all the departments of the road, are received and distributed. This company also constructed and built a car barn on west Twenty-fourth and Ingersoll avenue, size 125 x 252 feet, with a capacity for housing and taking care of 80 cars; there is also constructed an addition to the Second street car barn with a capacity for housing in addition about twelve cars.

During this entire period, there was not a suggestion by the city that the Turner ordinance had expired (Transcript, p. 564). The doing of this work was notorious. Both the city and citizens of the city knew that the work was being done and that large amounts were being invested by the company in it. The city admits in its answer that it knew this money was being expended and that the company claimed these rights (Transcript, pp. 25 and 26). If the city had the power to pass the resolution of November 21, 1905, it had the power to pass a like resolution the day after this money was invested, and to immediately destroy the investment. This is not a case where the city was authorized by law to purchase, or had reserved an option to purchase the property; consequently either both the city and the company understood when these investments were being made, that they were being made upon the strength of the rights granted by the Turner ordinance, or else they both understood that this money was being practically thrown away, that it was being invested subject to the caprice of any city council that might be elected, and that the better and more permanent the character of the work, the greater would be the hazard

of loss on the part of the company. It is utterly impossible to believe that either the company or the city believed that this investment was being made without some right in the street constituting to the company an assurance that the money was not absolutely thrown away.

In 1889 the city enacted an ordinance (Transcript, p. 546) providing that street railroad companies should pave five feet in width, which was the space between the rails, except in the case of the Narrow Gauge Company, where the rails were three feet apart. This ordinance was accepted by the various companies (Transcript, p. 548).

In the aggregate, under assessments for paving of this character, the company has paid about $120,000 (Transcript, p. 549). After January 1, 1898, the city continued to levy these assessments. It levied one of these assessments for about $6,000 on November 21, 1905, the day on which the resolution in controversy was passed (Transcript, p. 550), and it levied a like assessment on the 2d of January, 1906, the day after the answer in this suit was filed. A statement of these assessments made after January 1, 1898, as shown by the evidence of Mr. Hippee, is as follows:

| | |
|---|---|
| March 6, 1899 | $5,198.11 |
| March 31, 1899 | 4,577.75 |
| July 3, 1903 | 3,278.21 |
| Nov. 2, 1903 | 73.40 |
| Feb. 15, 1904 | 2,581.32 |
| March 24, 1904 | 7,301.00 |
| Dec. 30, 1904 | 3,022.00 |
| Feb. 20, 1905 | 1,058.00 |
| Nov. 21, 1905 | 5,933.62 |
| Jan. 2, 1906 | 1,040.39 |
| | $34,064.10 |

As an illustration of the procedure as to such paving, see Exhibit 226, p. 352, which directs the company to improve by paving in accordance with a contract therein referred to. It will be observed that the paving is done pursuant to direct

affirmative action by the city, so that it cannot be suggested that this was a matter of inadvertence. The assessments referred to are on account of paving ordered upon streets theretofore occupied by tracks.

In 1897 the State enacted a law requiring street railroads to pay the value of paving taken by them where their tracks were laid upon streets improved before the tracks were constructed (Code of Iowa, 1897, section 835). Under this section the city, on December 30, 1899, enacted an ordinance providing the method of ascertaining the value of pavement so taken (Transcript, p. 552). As illustrating the procedure, see Exhibit 207, p. 340. The board of public works makes a return of the value of the pavement. This is approved by the council and is followed by a direction (Exhibit 208) as to the distribution of the money paid in among the abutting property owners.

After January 1, 1898, tracks involving assessments of this character were laid to a length of 26,923.3 feet (Transcript, p. 553). In each instance where the company was about to lay one of these tracks the city acquiesced in its right to do so, and instead of objecting, made the assessment, accepted the money, and distributed it among the abutting property owners (Transcript, p. 584). The amounts paid in each year on this account, as shown by the testimony of Mr. Hippee (Transcript, p. 554), are as follows:

| | |
|---|---|
| Sept. 14, 1903 | $1,210.22 |
| Sept. 15, 1903 | 2,277.88 |
| Oct. 15, 1903 | 1,670.53 |
| Oct. 15, 1903 | 1,325.76 |
| Aug. 15, 1904 | 347.05 |
| May 12, 1905 | 620.42 |
| May 15, 1905 | 368.28 |
| June 15, 1905 | 986.67 |
| | $8,806.81 |

From time to time, commencing with October 1, 1889, the companies have issued bonds to provide funds for extensions,

additions and betterments, commencing with the consolidation of 1889. Most, if not all of the investments were made pursuant to the order of the city, or with its formal consent, made a matter of record. These bonds have been sold to the firm of N. W. Harris & Co., and by them have been sold to investors through the United States, principally in the eastern States (Transcript, p. 68). It appears from the deposition of Mr. N. W. Harris, commencing at page 67, that this firm first purchased 600 bonds on October 1, 1889, at 95 plus accrued interest, of which bonds there are now outstanding $390,000. Of a subsequent issue dated May 1, 1893, N. W. Harris & Co. purchased $291,000 at prices ranging from 80, immediately after the panic of 1893, to 100 per cent of the par value of such bonds, and $4,000 of these bonds are now outstanding. There was another issue dated April 1, 1901, more than three years after it is claimed these rights expired, and when it is now claimed the company was a trespasser or at best a mere licensee, of which N. W. Harris & Co. purchased $2,195,000 at prices ranging from 90 to 97½ cents and accrued interest. As already stated, these bonds have been sold to numerous investors, principally in the eastern States. The deposition of Mr. Harris shows various circulars issued in order to sell these bonds, and shows that in each instance the bonds were purchased by N. W. Harris & Co. in reliance upon the permanency of the Turner ordinance, and were sold by N. W. Harris & Co. under representations that the rights under this ordinance were permanent. It further appears that in connection with this matter there was furnished to N. W. Harris & Co. for the use of their counsel a printed copy of the ordinances of 1900 prepared by Mr. Baily which recognized the Turner ordinance as still in force The present outstanding bonded debt is $2,924,000, and every dollars of the proceeds of these bonds has gone into this property.

Every one of these trust deeds is a matter of public record, and it was notorious that the company was borrowing this money and making these investments. The answer (par.

21) admits the expenditure of larger sums, and (par. 23) that the company has "always claimed the right to build, extend and operate its street railways upon the streets of the city of Des Moines."

This review of the facts covers a period of almost forty years. There is no dispute as to any of these facts, nor is there any evidence of any facts which are inconsistent with them. We submit that this demonstrates beyond controversy that when this contract was entered into by the enactment and acceptance of the Turner ordinance, it was the intention of both parties that the grant made should be without limit as to time; that it demonstrates further that for almost forty years both parties to the contract have consistently acted upon this construction, and have by their acts confirmed it as the meaning of the contract. There is no claim that the company has not performed its duty to the public. There is no complaint that the facilities are not adequate or that the service is not excellent. In reliance upon this contract over half a million dollars in profits have been put into the property (Transcript, p. 546). In addition to the original investment in the stock and in addition to these profits, about $3,000,000 have been raised by the negotiation of bonds now held by innocent investors. Under these circumstances, may the city say that it is not bound by this contract—that it will destroy this investment, not because the company is not performing its duty to the public, nor because it claims the service is not adequate or that it is in any respect insufficient, but because it believes that if it may repudiate this contract, this will place the appellee in a position where the city can drive a hard bargain and where it can force the appellee to buy back at a dear price what it now owns and has owned for forty years?

Common honesty should be as commendable in the business transactions of a municipality as it is in the business transactions of a private corporation. As we shall see, the courts have applied to municipalities in the exercise of their proprietary powers the same rules that have been applied to

individuals. When the city, through a long course of dealing with this company and its predecessor, construed this grant as unlimited, when in 1900 it published it as an ordinance then in force, and furnished that publication to N. W. Harris & Co. to be used by their counsel in determining questions underlying the issues of bonds, it gave to this contract a construction which it cannot now question to the injury of those who relied upon it and invested their money upon the faith of it.

In the *Street Railway Cases* reported in 73 Iowa, a question arose as to the effect of some of the earlier revisions of the city ordinances of the city of Des Moines and it was contended there that they amounted to nothing because they had not been enacted with the formalities that should attend the enactment of an ordinance as distinguished from a resolution; and it was said that the ordinance adopting the revision was void because it embraced too many subjects. In this case the Supreme Court of Iowa said, at page 522:

> For the purpose of the opinion, it may be conceded that what purports to be an ordinance did not take effect as such, but it appears to us that it has the force at least of a resolution, so far as the provision in question is concerned. Plaintiff's assignor acted upon it and expended money not only in laying additional track, but in paying for street paving. We feel justified in saying that every one understood that the ordinance of 1866 was ratified and binding upon the city and the plaintiff's assignor, and that what was done afterwards was done with that understanding.

This rule of conduct, applied by the Supreme Court of the State of Iowa in 1887 in a litigation over this very ordinance between this city and the appellee's assignors, charges the city with notice that the same rules of construction will be applied in the future, and authorizes the company to rely upon them. It was a formal notice to the city of the consequences which would follow its concurrence in this construction of the ordinance by the public and by the com-

pany. This case established at least in equity what might be called *a rule of property* upon the faith of which the company acted, and by which as a necessary correlative the city is bound.

It is difficult to imagine language more appropriate to the present situation than that used in this quotation from the Supreme Court of Iowa. To paraphrase the language of the court, is there any doubt as to whether the testimony justifies us in saying that every one understood after 1898 that the Turner ordinance was binding upon the city and upon the appellee, and can there be any doubt that what was done thereafter was done with that understanding by both parties to this contract?

## II.

*That the ordinance in question constitutes a contract has been authoritatively determined, so that there remains only the question of construction.*

Reference has been made to the decision of the *Street Railroad Cases*, 73 Ia., 513, 75 Ia., 585, and *Des Moines City Railway Co. vs. City of Des Moines*, 90 Ia., 770. These cases adjudicated the validity of the Turner ordinance as a contract between the City of Des Moines and the Des Moines Street Railroad Co., and recognize the present company, the assignee of the Des Moines Street Railroad Co., as the holder of the rights granted by this ordinance.

In *Des Moines City Railroad Co. vs. City of Des Moines*, *supra*, the court said:

> The plaintiff is the assignee and owner of the rights conferred upon the Des Moines Street Railway Company by an ordinance of the city of Des Moines passed in the year 1866, and of the railway system which has been constructed under that ordinance and the amendments thereto. Some questions

arising under that ordinance were considered by this court in *Des Moines Street Ry. Co. vs. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 515, *Id.*, 74 Iowa, 586. It was held in those cases, in effect, that the ordinance and its acceptance constituted a valid contract between the city and the Street Railway Co.

These cases finally dispose of all questions as to the validity of this contract as a contract between the company and the city, and eliminate all questions now urged as to the power of the city to make this contract, as to whether such contracts are in accord with sound public policy, as to whether they are assignable, and all other questions which go to the validity of the contract as a contract. They determine the duration of the exclusive grant, and recognize we believe the permanence of the general grant. It is contended that this is not formally adjudicated, and consequently that there remains for determination the duration of this right. This is purely a question of construction. No question is presented as to whether there is a contract, or as to whether the statutes of Iowa authorized the city to make this contract, or as to whether the public policy of Iowa permits such contracts, because all of these questions have been determined by the Supreme Court of the State in litigation between the parties to the present action. These matters were adjudicated over twenty years ago, and ever since this adjudication both the city and the company have been acting in reliance upon it, as is demonstrated by the facts to which reference has been made.

We therefore pass directly to this question of construction without at this time referring to the authorities which amply sustain the conclusion of the Supreme Court of Iowa as to the validity of this ordinance.

## III.

*The grant in the Turner ordinance of December 10, 1856, is without limit as to time.*

Section 1 of this ordinance is the general grant. Section 10 is not a limitation upon this grant, but is an addition to it, making the right granted under section 1 exclusive for the term of thirty years. These two sections are as follows:

> SEC. 1. *Be it Ordained by the City Council of the City of Des Moines*, That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines with all necessary and convenient tracks for turnouts, side-tracks, and switches in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables or car-houses, and over the bridges and such streets in the City of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereinafter mentioned and prescribed.
>
> SEC. 10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

We submit that it is clear that section 10 was intended to confer an additional right, namely, an exclusive right, and that it is not intended as a limitation upon the general grant contained in section 1.

If the rights under this ordinance are limited to thirty years, counsel concede that the purpose to create this limitation must be found in the language in section 10 "the right herein granted to said company to operate said railway, shall be exclusive for the term of thirty years" The appellant, attempts by this language, clearly intended to add to the original grant, not to take something away from it. That this construction of this section is unsound is manifest.

(a) It does not come within the scope of the section, which deals solely with the exclusive right.

The section contains but a single sentence, the first portion of which says affirmatively that the right shall be exclusive. The remainder of the sentence, to protect this exclusive grant, provides that until the expiration of said term the city shall grant no rights which will interfere with or impair it. This section deals with nothing except this exclusive right. This is manifestly the construction which the Supreme Court of Iowa placed upon it. In the

*Street Railway Cases*, 73 Iowa, 513,

the court says at page 517, in answer to the contention that the exclusive right was merely the right to exclude others from operating over the roads constructed by the grantee:

> In our opinion, however, the meaning of the provision is the same as if it read, "the right herein granted to said company to operate said railway shall be exclusive" of other street railways. It was not necessary to provide by ordinance that other persons should not run cars on the plaintiff's assignor's track, nor obstruct its cars; and no one, we think, looking at the ordinance, can suppose that that was all that was intended. So far, the plaintiff's assignor's right would be exclusive by reason of the mere right of property, and without any ordinance. If anything more were necessary we find it in the very section of the ordinance under consideration. It is provided in the same section, and same sentence, as follows: "And the said

> city of Des Moines shall not, until the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company." The right granted was to lay and operate a track on all the streets of the city. The construction and operation of a rival railway would impair the plaintiff's rights. It might not constitute a physical interference, but it would impair, if not destroy, the plaintiff's enterprise, so far as the profits were concerned; and those, we may assume, constituted the sole object of the enterprise. We cannot think that there is any reasonable doubt about the meaning of the ordinance. *We think that the city undertook to exclude rival companies which would interfere with the profits of the company for whose benefit the provision was intended.*

In other words, the Supreme Court of Iowa limits the latter part of this sentence to this exclusive grant. It construes it to have for its purpose the prevention of anything which might interfere with the exclusive right conferred by the first part of the sentence. It treats the sentence, which constitutes the section, as dealing with but a single thought, namely, the creation and preservation of an exclusive right for a limited period. If this be sound this sentence is something separate and distinct from the grant contained in section 1 and was not intended to affect that grant as a limitation upon it, but was intended to add and preserve a separate, distinct, additional right.

(*b*) The words "after the expiration of said term" are significant.

If the purpose had been to limit the grant to thirty years and to make the grant exclusive for its entire term, the words "until after the expiration of" could not have been used, for then they would have been inapt; the single word "during" found in the Indianapolis section would have been retained.

The language used here is inconsistent with the conten-

tion that by this section the city reserves the right to destroy the general grant at any time after the expiration of thirty years. The language is, that the city shall not, until after this term has expired, grant to or confer upon any person or corporation privileges which will impair or destroy, etc. The right which it reserves to itself, and which it does not grant it away, is, after the expiration of thirty years to grant to other persons or corporations privileges which would impair or destroy any exclusive right if it were in existence. In other words, the purpose was to make it clear that after the expiration of the thirty years the city should have power to do, what it had contracted not to do during that period. It did not undertake after that time to exclude rival companies which would interfere with the profits of the company for whose benefit this provision existed during the thirty years. This section, as construed by the Supreme Court of the State, means that the city said it would not, until after the expiration of the exclusive term, grant rights to other companies which might interfere with the profits of the company exercising the rights granted under this ordinance. If the ordinance was to end with the thirty years there was no occasion for any reference to the rights of the city thereafter.

(*c*) The words "impair or destroy" are significant.

If the rights granted by the ordinance had terminated at the expiration of thirty years, there would have remained absolutely nothing which could have been by any action of the city thereafter, affected in any way, much less impaired or destroyed. In other words, the language of the ordinance clearly and unequivocally recognizes the fact that under it there would be in existence rights, after the expiration of this thirty-year period, which might be affected by the acts of the city in granting like rights to others; and the city made it clear that its power with reference to the grant of such rights to others, should be after the expiration of the thirty-year term, wholly unrestricted by the provisions of the ordinance.

(*d*) This section if rewritten in the language of the Supreme Court of the State, in the extracts which we have made from its opinion, would read as follows:

> The right herein granted to said company to operate said railway shall be exclusive of other street railways for thirty years; and the city undertakes that it will not, until after the expiration of said term, grant rights to rival companies which would interfere with the profits of the company for whose benefit this provision is intended.

This is exactly the construction which has been placed on this ordinance since its enactment by every company that has operated under it.

(*e*) The opinion expressly recognizes an obligation on the part of the company to make such extensions as may be necessary to furnish adequate service to the public.

Such extensions must obviously be made continuously. The company had not the right to cease making extensions five years or ten years before the thirty-year period expired; and yet it is unreasonable to believe that either the city or the company understood that the extensions were to be made up to the end of term without a possibility of a return.

(*f*) The opinion clearly treats these grants as separate grants. It says:

> In 1865 the city council of Des Moines passed an ordinance whereby it granted to the plaintiff's assignor, a company organized as a street railway company, the right to lay a single or double track along all its streets. The same ordinance provided that "the right herein granted to said company to operate said railway shall be exclusive for the term of thirty years." Many other provisions were made, not important to be set out.

This statement of the substance of the ordinance is inconsistent with the theory of the appellant. The court treats it first as a grant of a general street railroad right,

and second as a grant of an exclusive right for the term of thirty years.

The argument of the apellant is predicated solely upon the words "and for the time," which are found in the first section of the ordinance. It is said that the time there referred to is the thirty years mentioned in section 10. The argument of counsel is, that there is no other time mentioned to which they can refer, and that therefore they refer to this. They ignore the fact that to force this construction it is absolutely necessary to override the plain meaning and intent of the provisions of section 10. In other words, to make the two sections accord with their theory, they must absolutely overrule the express provisions of one of them. By a similar course of reasoning, this language might be made to refer to any section in the ordinance where time is mentioned. For instance, in section 7 it is said that the rate of fare shall not exceed ten cents for five years after the first mile of track is completed; but note that the section says that thereafter the rate shall not exceed six cents, without any limit as to time. Again, time is referred to in the ninth section with reference to the construction of the tracks. The ordinance is not to become effective unless certain conditions are complied with, and the rights granted may be forfeited on the happening of certain contingencies. Again, the year 1875 is referred to in section 11.

Before it can be successfully contended that two provisions in two sections are interdependent, counsel must at least show that to so link them together would not do violence to any express provision of either of the sections.

The argument that the use of the words "and for the time" *ex necessitate* requires something later in the ordinance in the nature of a limit, upon the grant is conclusively answered by the fact that the city of Des Moines in enacting Exhibit "62" (Transcript, page 154), already referred to, and, in re-enacting as a part of the Revised Ordinances of 1900, the

North Des Moines ordinance (page 429) included there words in each of these ordinances, notwithstanding the fact that the grant in each is unlimited as to time.

In

*Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234-248,

the Supreme Court of Iowa refers with approval to *Railroad Co. vs. Nave*, 38 Kan., 744. We quote from the Cedar Rapids case as follows:

> In the same general direction is the holding of the Supreme Court of Kansas in *Railway Co. vs. Nave*, 38 Kan., 744 (17 Pac. Rep., 587, 5 Am. St. Rep. 800). In that case the railway corporation obtained a grant for the occupancy of the street, and to construct its road within six months from the date of the ordinance. It failed to perform the work within the time limited, and, upon attempting to proceed thereafter, injunction was sued out by an owner of abutting property. The court says: "The contention that the privilege granted by the ordinance remains until a forfeiture is declared is not sound. *The permission conferred by the city was for a limited time, and when that time expired the privilege no longer existed.*"

*Railway Company vs. Nave, supra,*

involved a right to construct a railroad in a street, subject to certain conditions, and subject to these conditions, unlimited as to time. The Kansas court in the portion of its opinion approved in the *Cedar Rapids* case construes such a grant to be first for the limited time within which the conditions are to be performed, the grant becoming unlimited only upon their performance. We quote from the Kansas case an excerpt, including the quotation made in the *Cedar Rapids* case.

> *The permission conferred by the city council was for a limited time, and when that time expired the privilege no longer existed.* The grant is not an

> irrevocable one which continues indefinitely, to be accepted or rejected at the option of the company. The consent of the city council to occupy the street is a mere license, and, until the company has availed itself of the license, no contractual obligation or relation arises which requires a judicial declaration of forfeiture. Until the license is accepted and used, no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires the license lapses, and no revocation is needed to terminate the same. The railway company, or licensee, cannot thereafter occupy the streets, or build its road thereon, without a new permission from the city authorities.

If the doctrine of these cases is accepted, then under the provisions of section 9 this grant was, in the first instance, a grant for a limited time, until the first of January, 1869, when the first mile of track was to be completed. Upon a compliance with this condition the grant was extended until the first of January, 1871; upon compliance with the further condition it was extended until the first of January, 1873; and upon compliance with the final condition its character changed from a mere license to a contract unlimited as to time. This construction does not do violence to any of the provisions of the grant, and it is the only construction that can be adopted without conflict with the *Cedar Rapids* case, *supra*.

Furthermore, as suggested in the opinion of Judge Dillon, printed as an Appendix to this brief, these words may readily be referred to the exclusive right, giving force and effect to each provision of the ordinance without doing violence to any of its provisions.

If the *Cedar Rapids* case is not in point, we have section 1 providing that the grant is for the time and upon the conditions hereinafter mentioned, without any time stated to which this provision can be referred. This means, upon its face, that the grant is without limit as to time. Suppose

the grant were "upon the conditions herinafter mentioned, and there were no conditions mentioned; clearly it would be a grant without conditions, not subject to conditions.

The right granted is in the nature of an easement. "An easement is a *permanent* right conferred by a grant or prescription, etc." (162 N. Y., 126). Suppose A granted B an easement to cross his piece of ground "for the time and upon the conditions hereinafter mentioned," without imposing any time limit, can there be any doubt about the construction of such a grant?

The argument of counsel that the word "limitation" in section 14 of the ordinance relative to its acceptance, is in the plural is not persuasive. With reference to this matter counsel say:

> Section 14 of this ordinance provides that "within thirty days from the publication of this ordinance said company shall file with the city clerk a written acceptance of the grant hereinbefore made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company," etc. From this section it will be seen that the company accepted the ordinance with the full knowledge that certain limitations were expressed in it. Certain conditions were named in the ordinance and certain regulations were made for the laying down of the tracks and operation of the cars, and certain limitations were made as to the duration of the grant. If the duration of the grant were unlimited as to time, and the exclusive privilege granted in section 10 was the only limitation contained in the ordinance, section 14 would have provided that the acceptance must be by the company with the conditions, regulations and limitation above expressed. But it must have been clear in the minds of the city council when the ordinance was passed that there were two limitations, one limitation referring to the general grant as a grant, and the other referring to the term or duration of the exclusive or prohibitive feature of the grant. If this were not true this por-

tion of the ordinance was meaningless when the company accepted the same.

The ordinance is full of limitations. Section 1 limits the company to such alleys only fronting on which said company has depots, etc. Section 2 limits the power to animal power and forbids connections with other railroads and the use of the cars of other railroads. Section 3 limits the use of the tracks to the transportation of passengers and their ordinary baggage and the company's material. Section 4 limits the grade of the tracks and requires it to conform to the grade of the street. Section 5 is intended to limit the obligations of the city. Section 6 limits the right of the company as to the location of the tracks. Section 7 limits the rate of fare. In this way we might go through the entire ordinance. The fact is that the grants in the ordinance are contained in sections 1 and 10, the one granting the general right and the other the exclusive right, and the remainder of the ordinance consists of limitations, conditions and regulations imposed upon the rights granted by these two sections.

Our consideration of this ordinance has been confined to the ordinance itself. The ordinance standing alone clearly and unequivocally grants a right unlimited as to time. No other interpretation of it is possible without violating every established canon of construction.

## IV.

*A grant unlimited as to time is permanent.*

This proposition is settled, so far as this court is concerned, in

*Detroit vs. Detroit Citizens' St. Ry. Co.*, 184 U. S., 369-394.

In commenting upon the question whether the Detroit Company could accept a grant extending beyond its corporate life, the court says:

A corporation whose corporate existence was limited to a term of years could always purchase the fee in property which it needed for the operation of its business. It at the end of its term its life were not extended, the property which it owned was an asset payable to the shareholders after the payment of its debts, and in a case like the present, where the consent was assignable and transferable, particularly by virtue of section 15 of the Street Railway act above set forth, any company itself having corporate existence for that purpose, could purchase the outstanding term and operate its road thereunder. We see no reason why the company could not take the extended term as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the Circuit Court of Appeals for the Sixth Circuit in *Detroit Citizens' Street Railway Company and others vs. City of Detroit*, 12 C. C. A., 365; same case, 64 Fed. Rep., 628. In the course of the opinion of the court in that case, the cases of *People vs. O'Brien*, 111 N. Y., 1, and *Miner vs. N. Y. Central Railroad Company*, 123 N. Y., 242, were cited. People *vs.* O'Brien is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, *and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad;* the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case in 123 N. Y. announces the same doctrine. It is not a new one and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of

its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee.

The leading case upon this question is

*People vs. O'Brien*, 111 N. Y., 1,

which is cited with approval in the Detroit case, just referred to. In that case the court said (p. 38) as to the duration of such a grant:

> This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll vs. Railroad Co.*, 12 N. Y., 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.
>
> The title to streets in New York is vested in the city in trust for the people of the State, but under the constitution and statutes it had authority to convey such title as was necessary for the purpose, to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity which should be irrevocable. (*Yates vs. Van De Bogert*, 56 N. Y., 526, *In re Cable Co.*, *supra*.)
>
> Grants similar in all material respects to the one in question have heretofore been before the courts of this State for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity, for the purposes

of a street railroad. (*People vs. Sturtevant*, 9 N. Y., 263; *Davis vs. Mayor, etc.*, 14 *Id.*, 506; *Milhau vs. Sharp*, 27 Id., 611; *Mayor etc. vs. Second Ave. R. R. Co.*, 32 *Id.*, 261; *Sixth Avenue R. R. Co. vs. Kerr*, 72 *Id.*, 330.)

Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point.

The case of

*Louisville Trust Co. vs. Cincinnati*, 76 Fed., 296,

is cited with approval in *Blair vs. Chicago*, 201 U. S., 400, 486. We quote from page 315 of the opinion in the Louisville case as follows:

> The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city to grant an unlimited street easement to either a railroad or street car company, having the requisite franchise from the state. The act limiting the power of a city to a term not exceeding twenty-five years was not passed until May 14, 1878. Neither do we think there was any implied restriction upon the power of the city, springing from reasons of public policy. The corporation to which this grant was made was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets.

A strong case bearing upon the question decided by Mr. Justice Brewer is

*Kansas City Waterworks Cases*, 65 Fed., 691.

We quote, commencing on page 695, as follows:

> The other exception embraces two matters: First, the permanence of the right to use the streets and alleys of Kansas City, Kan., for a flow line; and second, the interests of Kansas City, Kan., in the supply station at Quindaro.

With reference to the first, it appears that on November 17, 1891, the city council of Kansas City, Kan., passed an ordinance, the first section of which is as follows:

SECTION 1. That for and in consideration of the sum of ten thousand ($10,000) dollars to it paid, the city of Kansas City, Kan., does hereby sell and transfer to the National Waterworks Company of New York, its successors and assigns, whether such successors and assigns be a natural person or a municipal corporation, located in this or any other State, the right to lay and maintain water mains under or over any stream and along, upon and across the streets, alleys, and other public grounds of the city of Kansas City for the purpose of conveying water to any city in this State or any other State; and there is also sold and contracted to said National Waterworks Company of New York, its successors and assigns, aforesaid, the right to maintain any and all water mains heretofore laid under, along, upon and across any such streets, alleys and other public grounds.

The ordinance was accepted and the $10,000 paid. There was no limitation expressed as to the matter of time, *and the language imports permanence of right, for it is "to lay and maintain."*

Note that section 1 of the Turner ordinance (Exhibit A, Transcript, p. 18), not only grants the right to construct and take, but also "to keep, maintain, use and operate."

In

*State vs. Commissioners*, 61 N. J. L., 470, and
*State vs. Traction Co.*, 62 N. J. L., 386,

two causes which arose out of the same transaction, this rule was applied.

In

*State vs. Ladies of the Sacred Heart*, 99 Mo., 533,

the same rule is applied in the construction of a grant to be a corporation which is without limit as to time.

*Suburban Elec. L. & T. Co. vs. East Orange*, 41 Atl., 865,

affirmed in 44 Atl., 628, but not reported in the official reports of the State, involved a statute authorizing the plaintiff company to string wires, etc., provided that in all incorporated towns the consent of the town authorities should be obtained, specifying the streets, etc. Consent was given, poles were set and wires strung. The town afterwards attempted to withdraw its consent, claiming the grant was a mere license revocable at will. The court rejected this claim and held that since no time was fixed it was perpetual and irrevocable. Note the language of the opinion at 41 Atl., 867:

> No time is fixed by the legislative authority for the continuance of the exercise of the franchises and the grant must be presumed to be perpetual.

In

*State ex rel. vs. Mayor, etc., of Jersey City*, 49 N. J. L., 303,

it was held that a city cannot revoke a designation of streets in which a telegraph company may place its poles after the company has conformed to the conditions and expended money in reliance upon the consent, such consent being given under statutory authority, the court said:

> I am of the opinion that, as a general rule, a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute. Certainly, after the expenditure of money in the erection of poles made in reliance upon the municipal designation, the company obtains a vested right, of which they cannot be stripped by a subsequent revocation of such designation. The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks or subterranean cables, or in erecting posts and stretching wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a

moment. A view that the rights of the corporation are of so unsubstantial a character is opposed to all judicial sentiment, from the *Dartmouth College Case*, 4 Wheat., 518, to the present time. *State vs. Blake*, 35 N. J. Law, 268, and cases cited on page 215. The power to repeal, suspend and alter charters contained in section 6 of the act concerning corporations (revision 178) does not reach the exercise of the authority attempted by the common council. No provision is contained in the act under which the prosecutors were incorporated which confers upon a municipality the power to revoke a permission once granted. The grant of the franchise to this company was subject only to a repeal or alteration by the legislature; and when that corporation had acquired vested rights in the mode designated by their charter, it certainly was not in the power of a common council to strip them of any right so acquired.

It was undoubtedly competent for the common council to couple with the permission such reasonable conditions as the occupancy of a public street by a telephone company's posts and wires would suggest; and without such conditions the erection and maintenance of appliances of the business of the company would be subject to the reasonable control of municipal by-laws. *Dill. Mun. Corp.*, secs. 555, 558, 575. But that the common council has the power, at its mere will, to annul the act, which has legalized the occupation of the streets, and so leave the company's property impressed with the character of a nuisance which can be at once abated, and their business thus destroyed, I cannot admit.

In *Railroad Co. vs. New Orleans*, 46 La. Ann., 526, the court says:

In the case of *City of New Orleans vs. Telephone and Telegraph Co.*, 40 La. Ann., 41, the court said:

Obviously upon the clearest consideration of law and justice, the grant of authority to defendant when accepted and acted upon became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations

> therein. Such has been the well recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat., 518.
>
> The city of New Orleans can as a matter of right refuse to grant the authority for a passage through its streets of a railroad. It can also demand a price for the privilege. But it can also as a matter of right, if it deems the exercise reasonable and proper grant the right of way to a railroad extending its lines into other territory without a compensation in money, but for other considerations.
>
> In the instant case the council has granted to a railroad company a right of way through certain streets for the purpose of operating its road beyond the limits of the city. The grant has been accepted, and except for a violation of its terms is irrevocable.
>
> *Africa vs. Mayor, etc.*, 70 Fed., 729.

was the case of the organization of a corporation under general statutes to operate a street railroad, the consent of the municipality being necessary for the laying of the tracks. It was held that since the ordinance granting the consent was without limit as to time, this consent continued so long as the right to be a corporation existed. While this case was reversed by the Circuit Court of Appeals, it was upon grounds not involving this question. Upon the appeal (77 Fed., 508) it was said:

> The consent when given by ordinance duly passed, constitutes a grant of a right of way on and over the streets named or described in the ordinance and *constitutes a contractual ordinance, conferring an easement which is irrevocable.* By such an ordinance an incorporeal hereditament is created and vested in the grantee.
>
> *Trustees of Southampton vs. Jessup*, 162 N. Y., 122,

involved a resolution stating that Jessup "is hereby given liberty to make a roadway and to erect a bridge across the

Great South Bay," etc. At page 127 the court says as to this grant:

> It is a special privilege because it is not of common right; it is permanent because there is no limitation as to time, and is of public concern because it relates to the public domain.

*Seattle vs. Columbia, etc., Railroad Co.*, 6 Wash., 379,

involved an ordinance of the city of Seattle granting the right to construct certain tracks in the streets. In this case, at page 392, the court says:

> Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to the rights of the respondents.

*Port of Mobile vs. Louisville & Nashville R. R. Co.*, 84 Ala., 115,

was a bill by a railroad company to enjoin the enforcement of a municipal ordinance, the bill being predicated upon the claim that the ordinance in question interfered with rights

which the company held under an earlier grant from the city. This grant was without limit as to time and was held to be irrevocable.

In *Milhau vs. Sharp*, 27 N. Y., 611, a street railroad right was involved. In holding the right perpetual the court says:

> I say perpetual, because there is no limitation in point of time to the continuance of the franchise and no direct power is reserved to corporations to terminate it.

It will hardly be contended that the grant is limited to the duration of the corporation. In

> *Detroit vs. Detroit Citizens' St. Ry. Co.*, 184 U. S. 394,

to which reference has already been made, this court expressly held a grant extending beyond the corporate existence to be good. In

> *People vs. O'Brien, supra,*

the corporation had been dissolved under an act of the legislature, and the question was whether the grant survived it and should be sold like other property of the corporation in winding up its affairs, and it was there determined that this right was property, to be disposed of like any other property. In

> *Blair vs. Chicago, supra,*

the doctrine of the Detroit case just referred to was reaffirmed, and the court says, at the bottom of page 481:

> In reaching this conclusion, we are not unmindful of the decision of this court in *Detroit vs. Detroit Citizens' Railway Co.*, 184 U. S., 368, 395, holding that although a corporation be organized for a limited period by the terms of its charter, it may receive a grant which would inure to the benefit of those lawfully entitled to succeed to the rights of the corporation, although for a period of years beyond the corporate life.

Not only the Turner ordinance runs to successors and assigns, but this is true of nearly every other ordinance introduced in evidence. The Des Moines Street Railway Company was organized in 1866 for a period of fifty years. (See article IV of its articles of incorporation, Transcript, p. 74.) At that time it was provided by the laws of the State of Iowa, under which it was incorporated (revision of 1860, section 1151) as follows:

> Among the powers of such body corporate are the following:
> 1. To have perpetual succession.

And by section 1158, as follows:

> Corporations for the construction of any work of internal improvement may be formed to endure fifty years; those formed for other purposes cannot exceed twenty years in duration; but in either case they may be renewed from time to time for periods not greater, respectively than was at first permissible, provided three-fourths of the votes cast at any regular election for that purpose be in favor of such renewal, and provided also that those thus wishing a renewal will purchase the stock of those opposed to the renewal at its fair current value.

These provisions which are still in force must be read into the articles of incorporation. This was expressly decided by the Circuit Court of Appeals for the Eighth Circuit in

> *Sioux City Terminal R. & W. Co. vs. Trust Co.*, 82 Fed., 124,

and is also announced by the Supreme Court of Iowa in

> *Thompson vs. Lambert*, 44 Iowa, 239.
> *Govin vs. Chicago*, 132 Fed., 848.

which is reported in this court as *Blair vs. Chicago, supra,* is readily distinguishable, and did not overrule the Detroit case in 184 U. S., or the other cases to which we have referred.

## V.

*The established canons of construction.*

There are certain established canons of construction to which resort must always be had.

(*a*) *The rules of construction applicable to statutes are likewise applicable to legislative enactments of cities.*

This proposition will hardly be controverted. The cases are entirely analogous, so that the considerations leading to the adoption of a rule of construction in the one case must be equally applicable in the other.

*In re Yick Yo*, 68 Cal., 294,

involved the construction of orders of the municipal council regulating laundries. In construing conflicting municipal enactments the court says:

> The rules for the construction of ordinances and orders of a municipal corporation are the same as for the statutes of the legislature.

In

*Zorger vs. City of Greensburgh*, 60 Ind., 1, 5,

the question was the construction of a penal city ordinance. Upon the question of construction the court says:

> The second section of the city ordinance, set out in the appellee's complaint in this case, must be construed in our opinion, in accordance with the rules which govern the construction of other legislation. In the case of *Lovejoy vs. Robinson*, 8 Ind., 399, it was said by this court that "In construing a statute, effect is to be given to every part, and we are not to suppose words had been used which were intended to import nothing." In the case of *Stayton vs. Hulings*, 7 Ind., 144, it was said, "Statutes should be so construed as to give a reasonable effect to every part, if capable of such construction." In 1 *Kent Com.*,

461, the law on this subject is thus stated: "It is an established rule in the exposition of statutes, that the intention of the law giver is to be deducted from a view of the whole and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms."

It seems clear to us that these rules for the construction of statutes are properly applicable to the construction of city laws and ordinances, and of the section of the ordinance of the city of Greensburgh on which this section was founded.

In

*Martin vs. City of Oskaloosa*, 126 Iowa, 680,

this doctrine is approved by the Supreme Court of Iowa. The question was whether a certain ordinance was intended to be retrospective. We make the following excerpt from the opinion, the italics being ours:

> There is not a word in the amendment ordinance from which it can be gathered that the same was intended to have any retroactive effect. On the contrary, the provisions thereof—and we need not set them forth—indicate that the ordinance was to have prospective effect only. *A statute—and, by parity and reasoning, an ordinance—will not be given effect retrospectively unless the intent is clear.*

Inasmuch as this is an Iowa transaction we assume that the case last cited is controlling. We call attention, however, to the following cases which recognize this doctrine:

*Denning vs. Yount*, 9 Kans. App., 708.
*Id.*, 62 Kans., 217.
*Ashland Water Co. vs. Ashland County*, 87 Wis., 209.
*People vs. Mayor, etc., of Brooklyn*, 14 A. D., 556.
*State vs. Kirkley*, 29 Md., 85, 103.
*Doane vs. City of Omaha*, 58 Neb., 815.
*People vs. Harrison*, 185 Ill., 307.

(*b*) *The history of an act may be resorted to in aid of its interpretation.*

The court will look to the history of the times in which the law was passed to aid in its interpretation.

*Aldridge vs. Williams*, 3 How., 23.
*United States vs. Union Pac. R. Co.*, 91 U. S., 79.
*S. W. Mo. Lighting Co. vs. Scheurich*, 174 Mo., 235.

From the opinion in the case last cited we take the following:

> A learned text-writer laying down the rule that contemporary history is to be consulted in construing a statute, quotes from the Supreme Court of the United States in *U. S. vs. Union P. Ry. Co.*, 91 U. S., 72: "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provision in it" (*Black on Interp.*, L., p. 212).

(*c*) *Contemporary construction is entitled to great weight.*

In

*Hahn vs. U. S.*, 107 U. S., 402, 406,

the court says:

> The court added that such construction did not appear to it unreasonable, and might well have been reached in the exercise of a sound judgment, and that, regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation, sanctioned by this court in the *United States vs. Pugh*, 99 U. S., 265, that, "in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. *Edwards, Lessees vs. Darby*, 12 Wheat. 210," and where this court refused to inter-

fere with such construction after it had been acted upon for a long time.

*In re Washington St. A. & P. R. Co.*, 115 N. Y., 442,

presented the question whether the general railroad incorporation law should be construed to authorize the organization of street railroads under it. The court said:

> Both corporations were organized under the general railroad act of 1850 and its amendments. It is claimed that such act does not relate to the incorporation of street railroads. This claim is at war with the generally received construction of the act. Ever since its passage in 1850, or at least within a very few years thereafter, corporations for transporting passengers by horses as a motive power, over railroads in the streets of cities, have been formed under and by virtue of the provisions of such an act, and no doubt has thus far been suggested as to the validity of such corporations.

It further says in the same opinion:

> For more than twenty-five years corporations of that nature have been formed under it, and no State officer whose duty it would have been to refuse to file such articles of association if the act did not provide for their organization has ever thus refused; but, on the contrary, there would seem to have been an uniform recognition of the right to file such articles, and of the legality of this kind of corporation thus formed. Such acquiescence and recognition on the part of the officers of the Government, are of very considerable, if not of controlling, weight in the interpretation of a general act of the legislature relating to public objects like the one under discussion. *Easton vs. Pickersgill*, 55 N. Y., 310; *People vs. Dayton, Id.*, 367. The consequences of a different construction at this late day, and after an acquiescence of so long a time, would, or might be, disastrous in the highest degree to other interests existing and founded upon the legality of an incorporation for horse-railroad purposes under the act of 1850; and this court would be reluc-

tant to give such a construction to the act, unless called upon by the plainest language of the legislature—so plain, indeed, that there could be no rational argument advanced in favor of the other view. No such case is made out here. We conclude that the first ground for denying the prayer of the petition is untenable.

(*d*) *The practical construction given to an enactment by those whose duty it is to enforce it, is entitled to great weight, and will not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous.*

*Sutherland Stat. Constr.* (2d ed.) Sec. 474.

*Westbrook vs. Miller*, 56 Mich., 148,

involved the validity of a tax deed signed by a deputy auditor. Judge Cooley, writing the opinion, said:

> When, in the performance of executive duties, it becomes necessary for the Executive Department to construe a statute, great deference is always due to its judgment; and the obligation is increased by the lapse of considerable time before its acts are called in question. This has been several times held by the Federal Supreme Court, and by the subordinate courts of the Federal system, and a reference to a few of the cases will be sufficient to show the current of decision. *McKeen vs. Delancy*, 5 Cr., 22; *Surgell vs. Lapice*, 8 How., 48, 71; *Bissell vs. Penrose*, 8 How., 317; *Union Insurance Co. vs. Hoge*, 21 How., 35, 66; *United States vs. Gilmore*, 8 Wall., 330; *United States vs. Pugh*, 99 U. S., 265, 269; *United States vs. Lytle*, 5 McL., 9; *Hahn vs. United States*, 14 Ct. Cl., 305; *Swift vs. United States*, 14 Ct. Cl., 481. It was also held by this court in the case of Malony *vs.* Mahar, 1 Mich., 26, where the question was whether a deputy county treasurer had authority to administer a certain oath in the place of his principal, and also in the subsequent case of Britton *vs.* Ferry, 14 Mich., 53. The case of Continental Improvement Co. *vs.* Phelps,

47 Mich., 299, 303, rests in part on the same principle. The cases in other States which hold the same doctrine are too numerous for citation, but as they all rest upon the inconvenience that would arise from unsettling what in good faith has been done in the necessary discharge of public duty, many citations would only serve to show the frequency in which the occasions for the application of the principle arose. As we have recognized and acted upon the principle heretofore, we may well leave this case to rest upon our previous decisions.

A case of especial interest, in that it applies this doctrine to the construction of a grant of rights in the highway, is *Turnpike Co. vs. Commonwealth*, 96 Ky., 225.

The mooted question was, whether under its charter the company had the right to establish toll gates at such intervals as it pleased, or only at intervals of five miles. The former construction had long been acquiesced in. The court says:

> If we are called on to construe these acts without regard to the construction adopted by all concerned some thirty-odd years ago, we might readily agree with the appellees. What we conclude is that the construction contended for by the appellant is not an inadmissible one, and in view of the contemporaneous interpretation of the meaning of the acts, and the long and continued usage under the law by those claiming a right under it, we think their construction the proper one. Mr. Pomeroy says: "The practical construction given to the statute by the public officers of the State, and acted upon by the people thereof, is to be considered, and is perhaps decisive in cases of doubt." Note to Sedg. St. & Const. Law, p. 227. In U. S. *vs.* Pugh, 99 U. S., it is said: "It is a familiar rule of interpretation that, in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. In Barbour *vs.* City of Louisville, 83 Ky., 95, this rule is fully

> recognized, and the meaning of language hardly to be deemed ambiguous was controlled by the construction put on it by those who procured the law under consideration, and who were charged with its execution. In Collins *vs.* Henderson, 11 Bush., 74, considerable stress was laid upon the light in which a law was received and held by the contemporary members of the profession. It is not necessary to notice minor errors in the judgment complained of. For the reason indicated, the judgment is reversed, for proceedings consistent with this opinion.

The same doctrine was applied as to matters of taxation in

> *Bloxham, Comptroller, vs. Street R. R. Co.*, 36 Fla., 519,

*Westbrook vs. Miller, supra*, being cited with approval and followed.

This court applied the same doctrine in

> *United States vs. Union Pac. R. Co.*, 148 U. S., 562,

where the question was as to the interpretation of a land grant; the contention of the railroad company was sustained, the court saying:

> If there were any doubts with regard to the interpretation of the act of 1869, the construction placed upon it by the land department for eighteen years, under which construction those lands have been put upon the market and sold, would undoubtedly be entitled to considerable weight.

Again, in

> *Bank vs. Parker*, 192 U. S., 73,

this court sustained a claimed exemption from taxation upon this theory, the opinion stating:

> This view is sustained by the contemporaneous construction of the bank's charter. It was not only the immediate sense of the officers of the State, but their continued sense through a number of years, that the

bank was exempt from all taxation, and when the right of taxation was asserted a license tax was not included.

To the same effect see

*People vs. Fidelity & Casualty Co.*, 153 Ill., 25.

(*e*) *Acts of the Parties.*

*It is settled that the familiar doctrine that the acts of the parties may be resorted to in aid of the construction of a contract, applies to contracts with municipal corporations.*

An early case in this court is

*Chicago vs. Sheldon*, 9 Wall., 54,

involving the construction of a street railroad ordinance under which the street railroad claimed an exemption from certain obligations as to paving. We take the following from the opinion:

> What adds great weight to this view is, it accords with the practical construction given to the contract by both parties. It was entered into, as we have seen, on the 23d of May, 1859. Several of these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the company. Nor was any question raised as to its exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves, is entitled to great, if not controlling influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of law. But, in an executory contract, and where its execution necessarily involves a practical construction,

> if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.
>
> There is another consideration in the case entitled to weight in the interpretation of this contract; and that is the language of the contract made between the city and the company in 1864. This ordinance is in *pari materia* with one of 1859, and helps to explain any ambiguity in it.

This rule is recognized in *Blair vs. Chicago*, 201 U. S., 486.

Again in

*Van Hostrup vs. Madison City*, 1 Wall., 291,

this doctrine is invoked. The question was whether the language in the charter of the city authorizing it to take stock in "any chartered company for making a road or roads to the said city," authorized a subscription for bonds of a road not extending to the city, but connected with one that did. The court said:

> Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. *Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of bona fide purchasers for value, we should have felt bound to acquiesce in it.*

A very strong case is

*St. Louis Gas Light Co. vs. St. Louis*, 46 Mo., 121.

Here there was involved the construction of a contract for lighting between the city and the company. We take the following extract from the opinion:

> Assuming that there is sufficient doubt as to the meaning of this agreement to admit of construction, I will first consider the question whether the court was

bound to construe it from its language alone, or whether the actions of the parties might be inquired into in order to ascertain the construction which they put upon it for themselves; in a word, whether in the use of words of doubtful meaning or application, the meaning and application given them by the parties who used them shall prevail over an interpretation that might be given by the court. It seems to me that the statement of the question should carry with it the proper answer. It has nothing to do with the old question of admissibility of evidence to contradict or vary a written agreement. The law upon that matter has been too long and well settled to be subject to any doubt whatever, and the position taken by the circuit court in its instruction to the jury does not involve its consideration. Nor is it the same question that so often arises when evidence is offered to explain a latent ambiguity, though it has a strong analogy to it.

Our daily experience impresses us with the imperfections of common language and shows the errors into which we constantly stumble in the use of the most important medium we possess for the communication of ideas. Such is the indefiniteness of words and phrases in daily use, and of so many meanings and shades of meanings are they susceptible, according to their arrangement, application, figurative or provincial, use, or the different ideas attached to them by different persons, or by the same persons on different occasions, that no science or special art can be taught and no mechanical occupation can be prosecuted without the precision of technical terms and phrases. And if simple words and phrases so fail to communicate ideas with accuracy and precision, so much the more may parties to a long and complicated agreement not only fail to understand it alike, as is shown by every day's dispute, but if they agree in its meaning they may give it an interpretation differing from that which a court accustomed to greater precision of language would consider the most natural. In a case of that kind, whose interpretation should prevail? If the court gives one differing from that understood by the parties, it in effect makes a new agreement—the very thing most to be avoided. If it leaves

the parties to be governed by their understanding of their own language, it in effect enforces the contract as actually made. That they should be so permitted to construe their own agreement, accords with every principle of reason and justice.

It is true that evidence of such understanding should not be entertained when the language is clear and will admit of but one interpretation, because in that case, unless there is a fraud or mistake, the language used is the best possible evidence of the intention. Nor should any regard be paid to loose declarations or equivocal or isolated acts, but the continuous conduct of the parties for a series of years concerning the subject-matter of the contract, and in fulfilment of its conditions—every act pointing in the same direction—may make their understanding as clear as by the greatest precision of language.

* * * * * * *

Most of the instances where resort is had to acts, etc., in aid of construction, are found in cases where the meaning and application of words in old grants, in the location of highways, etc., are controlled by the signification attached to them for a series of years by the parties or by those interested. Thus, in *Wadley vs. Bayliss*, 5 Taunt., 782, *in relation to the enjoyment of a right of way under an old award, the court held that "the language of the award being ambiguous, it was competent to go into evidence of the enjoyment had, in order to see what was the meaning of those who worded it."* And in *Livingston vs. Ten Broeck*, 16 Johns., 15, the usage of the parties under a deed was held admissible to explain its terms.

*Mobile vs. L. & Nashville R. R.*, 84 Ala., 115.

Note also what this case says about contemporaneous construction. We quote from the opinion at page 122. After referring to the fact that the rights claimed had been exercised without complaint or interruption for between seventeen and eighteen years, the court says:

A contemporaneous construction of a law is of very high authority. The practical exercise of a right

> under it, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. The practical construction thus established by years of uniform usage is often allowed by the courts, even in doubtful cases, to have the force of settled law. A like rule prevails in the construction of contracts, the courts being always strongly inclined to interpret every agreement as the parties themselves would have done by practical usage, regarding their conduct in the every-day execution of its terms as an agreed interpretation of them.

*State Ex rel. vs. Mayor*, 49 Mo., 401,

was an action for a mandamus to compel the city of St. Joseph to deliver bonds under a bridge subscription. In connection with the construction of the ordinances in question the court said:

> This was the contemporaneous construction placed upon the ordinance by the parties themselves, and on which they have acted, and upon which large and important interests have vested. Although this would not be controlling if the language was clearly the other way, yet in doubtful cases it is entitled to and should receive weight.

A case to which we call especial attention is

> *City Ry. Co. vs. Street Ry. Co.*, 38 Pac., 986, not in the official reports.

In that case a question arose under a street railroad ordinance, and the court said:

> In the present case the acts of recognition by the city council of the continued existence of plaintiff's franchise have been numerous and unequivocal. For fourteen years, of which at le[illegible] eleven years were after the alleged ground of forfeiture had occurred, the city in every possible way, by direct dealing with plaintiff, by its public resolutions, orders and ordi-

nances, and by its pleading in a judicial proceeding, recognized plaintiff's franchise as valid and in force, insisted upon and took steps to enforce the obligations assumed by plaintiff by its acceptance of that franchise. In consequence of those official acts, plaintiff incurred expense in paving the public streets, in paying taxes, and in other ways, which it would certainly not have incurred had the alleged forfeiture been insisted upon. As the fact that plaintiff had not constructed its railway on certain streets was necessarily one of public notoriety, it must be presumed that the city council had knowledge of it; and its acts, in view of that knowledge, conclusively import a waiver of the right to insist upon a forfeiture, and estop the city from ever claiming that a forfeiture has occurred. And the city is by law the agent of the public for this purpose, this estoppel extends to the whole public and binds the defendant and all other persons. *People vs. Holladay*, 93 Cal., 241; 29 Pac., 54. * * *

On the trial plaintiff offered in evidence an ordinance of the city, duly passed July 10, 1889, and numbered 110, granting to plaintiff the right to construct on Fourth street a switch to be "connected with the main track of the Santa Rosa Street Railroad, now laid and constructed on said Fourth street." In that ordinance it was provided that the term of the franchise thereby granted should "extend until the expiration of the term of the franchise for laying, etc., the main track of the Santa Rosa Street Railroad." This ordinance was excluded by the court on defendant's objection that it was "irrelevant, immaterial and incompetent." From what has been said above, it follows that this ruling of the court was error. The ordinance contained an unequivocal recognition of plaintiff's franchise, and therefore tended to show both the original existence of the franchise and waiver of the alleged forfeiture.

In

*Auditor vs. Cain*, 22 Ky. L. Rep., 1888,

the court held itself bound by the generally followed construction of a statute as to jurors' fees.

In

*Sherman vs. Rugbee*, 16 Vt., 439,

there was involved the validity of a school meeting and it was there said:

> In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable length of time.

In

*Van Hostrup vs. Madison City, supra*,

this court said:

> Where the true construction of the charter remains in doubt, and the construction adopted by the city authorities had been acquiesced in generally, and acted upon by third persons in good faith with their transactions with the city, it will be precluded by the courts in actions by such third parties from denying this construction to be a true one.

(*f*) *Matters in pari materia.*

It is a fundamental rule of construction that all enactments pertaining to the same subject matter must be taken together, as if enacted at the same time and as a part of a single law.

There is a presumption that the law is harmonious and the enacting body is presumed to have had in mind its earlier enactments and to have acted with reference to them. This rule applies to ordinances as well as to statutes. The reasons for its application are identical in each case.

In

*Railway Co. vs. Railway Co.*, 38 Pac., 986,

which is not reported in the official reports, the court says:

> On the trial plaintiff offered in evidence an ordinance of the city, duly passed July 10, 1889, and numbered 110, granting to plaintiff the right to construct on Fourth street a switch to be "connected with

> the main track of the Santa Rosa Street Railroad, now laid and constructed on said Fourth street." In that ordinance it was provided that the term of the franchise thereby granted should "extend until the expiration of the term of the franchise for laying, etc., the main track of the Santa Rosa Street Railroad." This ordinance was excluded by the court on the defendant's objection that it was "irrelevant, immaterial and incompetent." From what has been said above, it follows that this ruling of the court was error. The ordinance contained an unequivocal recognition of plaintiff's franchise, and therefore tended to show both the original existence of the franchise and a waiver of the alleged forfeiture.

See also

*Penn. Co. vs. Frana*, 13 Ill. Ap., 91.

In

*Chicago vs. Sheldon*, 9 Wall., 50,

this court referred to an ordinance passed in 1864 to ascertain the meaning of an ordinance passed in 1859, and said on page 55:

> There is another consideration in the case entitled to weight in the interpretation of this contract, and that is the language of the contract made between the city and company in 1864. This ordinance is in *pari materia* with the one of 1859, and helps to explain any ambiguity in it.

In

*State vs. Shaw*, 28 Iowa 78,

the court says:

> It is a well settled rule that all statutes in *pari materia* for the purposes of arriving at the legislative intent are to be taken together and *examined as if they were one law, though enacted at different times and not referring to each other.* Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons and things. *United Soc. vs. Eagle Bank*, 7 Conn., 457.

The rule is recognized in

*The State vs. Sherman*, 46 Ia., 415-422.

There the court says:

> These afford clear indications of the will of the legislators, because it must be presumed that statutes are intended to be harmonious in all their parts, and *consistent with all other statutes upon the same subject which are not repealed*, and that the language of the law-makers was used in reference to the subjects of the statutes in a sense that would promote the remedy of relief which is the object of the enactment.

In this court this rule was announced as early as 1809 by Marshall, C. J., in

*Alexander vs. Alexander*, 5 Cranch, 1-7,

where the court said:

> If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, *the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act*, is a *direction* to courts in expounding the provisions of the law.

In that case the two statutes were fifteen years apart. The court in

*United States vs. Freeman*, 3 How., 556-564,

says:

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts in *pari materia are to be taken together as if they were one law*. Doug., 30; 2 T. R., 387, 586; 4 Man. & Sel., 210. If a thing contained in a subsequent statute be

within the reason of a former statute, it shall be taken to be within the meaning of that statute; Ld. Ramy., 1028; *and if it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.*

*Atkins vs. The Disintegrating Co.*, 18 Wall., 272-301.
*Cope vs. Cope*, 137 U. S., 682-688.
*Stockdale vs. The Insurance Companies*, 20 Wall., 323.
*Sutherland on Stat. Construction* (Ed. 1904), Sec. 448.
*Perkins vs. Perkins*, 62 Barb., 531, 534.
*In re Livingston*, 121 N. Y., 104.
*Commonwealth vs. Sylvester*, 13 Allen, 247.
*In re Hall*, 38 Kan., 670.
*Powell vs. Sherwood*, 162 Mo., 605.
*Railroad Co. vs. Zernecke*, 59 Neb., 689.
*Commissioners vs. Life Ins. Co.*, 90 Fed., 222.
*Cochen vs. Meth. Prot. Church*, 32 App. Div., 239.
*Duncan vs. Owens*, 47 Ark., 388.
*Merrill vs. Gorham*, 6 Cal., 41.
*Ferrari vs. Board of Health*, 24 Fla., 390.
*People ex rel. vs. Hazlewood*, 116 Ill., 319.
*Hunt vs. Railway Co.*, 121 Ill., 638-644.
*State vs. Township*, 6 Ind., 83, 90.
*State vs. Gerhardt*, 145 Ind., 439.
*Kollenberger vs. People*, 9 Col., 233.
*Cincinnati vs. Guckenberger*, 60 Oh. St., 353.
*Town vs. State*, 59 Vt., 39.
*Simkins vs. Ward*, 45 Mich., 559.
*Trust Co. vs. Iron & Coal Co.*, 47 Fed., 136.

In the recent case of

*Chamberlain vs. Telephone Co.*, 119 Iowa, 619,

the Supreme Court of Iowa has again unequivocally committed itself to this doctrine.

A street railroad case illustrating the rule is

*State vs. Newport Street Railway Company*, 16 R. I., 533.

A question arose as to whether a street railway had the right to cross a particular street. The court says:

> The fact that the company had previously laid a track across one of the accepted streets without hindrance in order to reach a wharf upon which they were authorized to run their cars confirms the inference that such a power was not excluded by the charter.

## VI.

### *The Rule of Strict Construction.*

Counsel cite an overwhelming array of authorities in support of the proposition that grants made by municipalities will be strictly construed and that all doubts will be resolved in favor of the public. As to this general proposition there can of course be no dispute. It does not mean, however, that whenever there is a municipal grant involved, all that it is necessary for the municipality to do is to deny its validity in order to create a doubt which shall result in the destruction of the rights conferred by the grant. The doubt must be one that fairly arises and that cannot be resolved by the application of the rules of construction.

*Blair vs. Chicago, supra,*

well illustrates what is necessary to raise such a doubt as to render this rule applicable. As to the construction which was repudiated there, the court says:

> "But in this act the construction insisted on by the companies is inconsistent with the policy of the State" (p. 465).
>
> That "it practically reads out of the act the preceding clause of the very section under consideration" (p. 465).

That "it requires us to ignore or entirely change the sense of terms establishing the contracts as made" (p. 466).

That "it requires an interpretation which applies to the future what is specifically meant for the past" (p. 466).

That it does "violence to the rule that words are to be considered in their ordinary signification, and every part of the statute, if practicable, given meaning in harmony wth its other provisions" (p. 466).

That it does "violence to the very terms of the law" (p. 467).

And that "each construction could be maintained with at least equal force" (p. 471).

In that case the conclusion is predicated on the finding that there had been no recognition by the city of the construction which was claimed by the company. The circumstances referred to would unquestionably be enough to create a doubt.

The rule is well stated in

*People ex rel. The Gas Co. vs. Deehan*, 153 N. Y., 528, 532.

It is there said, in construing a grant of rights in a street:

> The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. But the obvious intention of the parties when expressed in plain language cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results not contemplated or intended should be avoided in a grant as well as in a statute.

Again in

*Trustees of Southampton vs. Jessup*, 162 N. Y., 122, 127,

the court says:

> In construing this franchise we are not to lose sight of the principle that a grant from the public, so far as it is ambiguous, is to be construed in the interests of the public, and hence in favor of the grantor and not as in ordinary cases in favor of the grantee. This principle, however, is to be applied only when doubt arises, for when the meaning is clear there is no room for construction.

This court in

*Citizens Bank vs. Parker*, 192 U. S., 73, 85,

in very vigorous language denies that the office of this rule is to compel an immediate surrender to an ambiguity whenever it is suggested. The court says, after stating its conclusion:

> And in reaching that conclusion the rule requiring the strict construction of statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised as to the meaning of a statute, ambiguity occurs which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and at times decisive. Its proper office is to help solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, effective maybe when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute. Will courts ever be exempt, or have they ever been exempt, from that duty? Has skill in the use of language ever been so universal or will it ever be so universal as to make indubitably clear the meaning of legislation? Has forecast of events ever

> been so sure, or will it ever be so sure, as to make inevitably certain all the objects contemplated by a statute? We think not, and there never will be a time in which judicial interpretation of laws will not be invoked, and it cannot be omitted because a doubt may be asserted concerning the meaning of the legislators. We repeat, it is the judicial duty to ascertain if doubt exists.

Counsel for the appellant have utterly misapprehended the force and office of this rule. They do not attempt to point out a single ambiguity in connection with the ordinance in question. They say that the ordinance is clear and unambiguous and that the rights granted under it are limited to thirty years. They do not suggest a doubt as to its construction. Their interpretation of the rule is directly in the face of what has just been quoted from this court. Their interpretation of it is that whenever a controversy is or can be raised the ambiguity arises.

The city has for forty years concurred in the interpretation of this ordinance as a permanent grant. After this lapse of time, the city may raise a controversy, but it cannot create an ambiguity as to what has so long been settled.

After all is said, in its final analysis, the argument of counsel is not that any real ambiguity exists, but that now, after the rights of the parties have been fixed for forty years, the city should be permitted to repudiate all that it has done since 1866, in order to enable it to destroy this grant by engrafting on it a constructive limitation, directly opposed to the real intention of the parties.

## VII.

*The city is estopped from assailing the Turner ordinance.*

Counsel admit in their brief that when the consolidation of 1889 was made, it was contemplated by both the city and the company that the consolidated property should be operated under the Turner ordinance, and not only concede, but contend that thereafter and down to the present time

the property had been operated under that ordinance. The evidence shows without dispute that upon this basis and in reliance upon this ordinance, the Broad Gauge and Sevastopol properties were acquired; the Turner ordinance was amended; the suit assailing its validity was compromised; the entire property was rehabilitated; that after the 1st of January, 1898, the mileage was more than doubled and almost three-quarters of the old mileage was rebuilt; that large additions to the power house and equipment were made; that the latest trust deed, which is a matter of public record, and under which $2,195,000 of bonds have been issued, was not executed until April 1, 1901; in fact, that substantially every dollar of the present investment has been invested by the company since the 1st of January, 1898, in reliance upon its right to operate under this ordinance and with the knowledge and acquiescence of the city and without protest or objection from any one.

It further affirmatively appears that during this period from time to time the city council has passed resolutions authorizing or requiring additional investments, predicating these resolutions upon the existence of this Turner ordinance. These matters are fully set up in the bill of complaint. The answer does not deny that the money was invested; it admits that the city knew the company claimed these rights; and there is no averment of any protest or objection by it. Under these circumstances we say that under the authorities the city is beyond question estopped from now asserting that this ordinance did not authorize what was done under it, with such knowledge by the city.

In this connection it should be borne in mind that the powers of the city which are involved here are its proprietary or business powers, as distinguished from its governmental or public functions, and that in the exercise of these powers it is bound by the same rules that apply to private persons.

*Illinois Trust & Savings Bank vs. City of Arkansas City*, 76 Fed., 271.

*Omaha Water Co. vs. City of Omaha*, 147 Fed., 1.

*Bailey vs. Mayor, etc.*, 3 Hill (N. Y.), 538.

*State ex rel. vs. Barker*, 116 Iowa, 96, 103.

In the case just cited the Iowa court says:

> The dual capacity of such a corporation has long been recognized; in other words, it is in part a public agency of the State and in part possessed of local franchises and rights which pertain to it as a legal entity for its corporate advantage. The right of a municipal corporation to hold and manage property, to sue and be sued, and to act generally as a private corporation in supplying local needs and conveniences has been distinctly recognized by a long line of well considered cases.

The Supreme Court of Iowa cites many authorities in support of this statement, including

> *Illinois Trust & Savings Bank vs. City of Arkansas City*, 76 Federal, 271.

decided by the Circuit Court of Appeals for the Eighth Circuit, and was approved by this court in the *Walla Walla* case. With reference to the exercise by a city of its business or proprietary powers, the court there says:

> But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation.

In that case it was objected that a water ordinance had never been passed, but was defeated by a vote of the council. Commencing at page 293, the court says:

> There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract which its records and its conduct have constantly made, and in reliance upon which the gas

> company and the water company constructed and extended the water works, and the bank and the bondholders loaned their money.

In support of this proposition Judge Sanborn quotes from the opinion of this court in

*Zabriskie vs. R. R. Co.*, 23 How., 381, 400, 401,

saying:

> The Supreme Court held that a corporation was estopped to question the validity of its void guaranty because it had permitted the circulation of bonds that carried it:
>
> "A corporation quite as much as an individual is held to a careful adherence to truth in all their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claim of their own conduct as superinduced. * * *
>
> "In a business transaction like that of procuring the construction of waterworks and the use of water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations."

The argument of counsel in resistance to this contention is predicated upon the assumption that in order to grant a street railroad right after 1897, a vote of the people was necessary, under the provisions of sections 775 and 776 of the Code of 1897 of Iowa. Section 775 empowers cities and towns to authorize and regulate street railway and other electric wires and poles and support thereof. Section 776 provides that no franchise shall be granted for the use of streets for the purposes named in section 775 unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. The appellee operates its cars by means of electricity supplied from overhead wires.

Section 767 of the Code grants to cities power to authorize or forbid the construction of railway and street railway tracks. As to this, no vote is necessary. Consequently, as the law now stands in Iowa the city has the power, without the concurrence of a vote of the people, to grant the right to maintain and operate tracks. A right to maintain poles and wires must be confirmed by a vote of the people. Therefore the argument of counsel upon this proposition must be limited to the right to maintain poles and wires and cannot be directed against the right of the company to maintain its tracks.

By the ordinance in question the company is not limited to electricity as a motive power. Its provision is that the cars "shall be operated by animal power or by electricity or other practical motor power" (section 2, ordinance March 8, 1890; Tr., p. 10). The resolution that is in controversy (Tr., p. 15) directs the removal of all of the tracks as well as of the poles and wires. If the company had not the right to maintain the poles and wires there would remain the right to maintain its tracks and to operate by horses, compressed air, cable, underground trolley, or by the use of gasoline or other power, not involving the use of poles and wires.

We submit that the contention of counsel is not sound and that the authorities to which we are about to call attention demonstrate that this estoppel is good not only as against the city, but as against the State and as against abutting property owners; in other words, as against all interested persons who stood by and permitted this investment upon the faith of this ordinance without protest or objection. The authorities which counsel cite are to the effect that where concurrent action is necessary on the part of two or more bodies an estoppel predicated upon the affirmative act of one is not enough. None of them holds that an estoppel arising out of the silence and acquiescence of all interested parties is not good.

The first case to which we wish to call attention is

*Atty. Genl. ex rel vs. R. R. Co.*, 24 N. J. Eq., 50.

This case sustained an estoppel growing out of acquiescence as against the State itself. The railroad had built a bridge, and during its construction, while the money was being spent, no question was made as to its authority. The court says:

> If acquiescence cannot be imputed to the complainants they certainly are chargeable with delay, which, though it may not amount to proof of acquiescence, may be sufficient to disentitle the complainants to the summary interference of the court by interlocutory injunction; and this principle applies with peculiar force where the act complained of is caused by a public company in the execution and construction of their works.

An estoppel against the public was recognized in

*State ex rel. West vs. Des Moines*, 96 Iowa, 521.

There the Supreme Court of the State decided that the statute under which the city of Des Moines is organized is unconstitutional, but held that the State and every citizen of the city were estopped, by their acquiescence for a period of only four years, from thereafter questioning the power of the legislature to make this enactment.

The same doctrine is asserted in

*State vs. Town of Westport*, 22 S. W., 888.
*State of Arkansas vs. Leatherman*, 38 Ark., 81.
*Cooley on Const. Lim.*, 4th ed., p. 32.

In the case at bar the testimony shows that in each instance where the company was about to construct track upon streets already paved, it asked the city to assess, under a statute of the State, the value of the pavement which it proposed to take. That in each instance after the 1st of January, 1898, the city, instead of questioning the author

ity of the company to make these extensions, proceeded with the assessment, and that in each instance the money paid by the company was distributed among the owners of the abutting property. After January 1, 1898, 26,923.3 feet of the present track were so constructed (Tr., pp. 553, 554, and 584). The citizens who owned the abutting property accepted without protest or objection the payment of this money which counsel concede was expended by the company in the exercise of the rights which it claimed under the Turner ordinance.

In

*Att'y Gen'l vs. Superior & St. Croix R. Co.*, 93 Wis., 604,

it was contended that the charter of the railroad company had been forfeited. The opinion says at page 613:

> The State might waive the grounds of forfeiture alleged (Beach, Priv. Corp., par. 59 and cases cited). And we are of the opinion that it did waive them by the enactment of ch. 244, Laws of 1895, amending its charter and recognizing in the most explicit manner the continued existence of the corporation, and among other things expressly permitting its right to exercise the power of eminent domain in the manner prescribed by the general railroad law in addition to the method pointed out by its original charter.

In the case at bar the city when it revised the city ordinances in 1900 re-enacted this Turner ordinance as an ordinance then in force (Tr., pp. 390, 402). In

*C. R. I. & P. R. Co. vs. City of Joliet*, 79 Ill., 25, 37,

the court considered the effect of estoppel in support of a right to occupy public grounds with railroad tracks. The court says:

> The validity of these grants and the rights of the railroad company under them have, as we regard the evidence, been recognized by the express action of the city of Joliet for a period of over twenty years.

> The evidence shows that the company in 1852 preferred another and more direct line. The person who had the general charge of the building of the road and who was a director and vice-president of the company testifies that at a public meeting of the citizens of Joliet in the courthouse (he thinks) he made a speech and remonstrated against running the railroad through the courthouse square; pointed out the annoyance and inconvenience that would arise therefrom; but the popular demand for the track and depot where they now are, overbore all opposition, and as the agent of the company he yielded to the demand of the citizens, much against his own judgment * * * This is referred to, not to show that any right which was given by such an assemblage of citizens or by "the popular demand," but as a circumstance to be considered among others as bearing upon the question of an equitable estoppel.

Here is a direct recognition of an estoppel against the public, not predicated upon a formal act like a vote of either electors or of a city council.

The opinion refers to a grant of privileges from the city which could not have been made available without continuing the operation of the trains over these public grounds, just as the evidence here shows changes in the tracks for the benefit of the entire system, as well as extensions and additions in outlying districts that could only be made available by the use of the remainder of the system and which were made at the request of the city. In this connection the Joliet case says:

> Here was not only recognition on the part of the common council that the company had a valid grant of the right of way over these grounds and confirmation thereof, but there was express grant by ordinance of aid and convenience in order to the future permanent and more full enjoyment of the right of way which had been granted to the company over this public ground.

Reference in that case is made to the fact that the railroad company was asked by the county authorities, with the knowledge and encouragement of the city, to pay a portion of the expense of fencing the public square.

The evidence in this case shows that the city not only "encouraged," but required this company to pave the space between the rails of its tracks whenever a street was ordered paved, down to *a date subsequent to the filing of the answer in this suit.* In the Joliet case it is said with reference to a levy of taxes:

> The levying of local taxes under the ordinance of the city was in effect a declaration upon the part of the city that the county was the owner of this property; an admission that it had the dominion over it and the right of directing its use, and consequently a virtual assent to and confirmation of the grant of the right of way over the same which it had made to the railroad company.

By a parity of reasoning, the $35,000 which the city has exacted fr[illegible] the appellee since the first of January, 1898, on account of this paving and which has to that amount benefited the owners of abutting property by a reduction of the amount assessable against them, is a recognition not only by the city, but by the property owners of the right to maintain and operate this street railway. Indirectly, this reaches to every inhabitant of the city, because every inhabitant of the city is interested in the pavement and maintenance of the streets.

The conclusion of the court in the Joliet case is in this language:

> From all these positive acts of recognition on the part of the city of Joliet of the right claimed by the railroad company and in acquiescence in its exercise, there must be held to be an estoppel *in pais* against the city—if that principle be applicable at all to municipal corporations as respects public rights.

The court there sustained the estoppel, and we submit that every consideration which could be urged in favor of it there is found in the record here, not only once, but iterated and reiterated.

The same doctrine is applied in

*City of Atlanta vs. The Gate City Gaslight Co.*, 71 Ga., 106.

The question in this case was whether a charter granted to the gaslight company authorized it to maintain a gas plant in the city. Upon the question of estoppel the court at page 125 says:

> But apart from all these considerations the city of Atlanta has stood by and seen this company make an outlay of $140,000 under the exercise of their rights under this charter without intimating to them that objection would be made to their use of the streets for the purpose authorized, and without the use of which their enterprise would not have been undertaken and could not have been prosecuted, and without which they would lose their entire outlay and be involved in irretrievable ruin. Upon every principle of equity this failure to notify the complainant of their intention until such expenditure had been made, would estop them. Such conduct is fraudulent in the eye of the law, and where practiced upon an innocent party who is seeking *bona fide* to carry out the provisions of its charter by availing itself of the powers and privileges thereby granted, would, if anything could, debar them from now being heard.

*Penna. R. R. Co. vs. Montgomery County Passenger Ry. Co.*, 167 Pa., 62.

is another case which holds that the estoppel is good as against individuals as well as the municipality. In this case the consent of the township supervisors had not been properly granted and the road was constructed without the

consent which the law requires. With reference to this matter the court says at page 72:

> But we know as a matter of current history that street railways have been projected and actually constructed and are now in operation over the country roads where no legal consent has been obtained and where no attention has been paid to the rights of property owners. Such railways cannot now be torn up or enjoined either by the township officers or at the instance of land owners along their routes. Where such enterprises have been allowed to proceed and the expenditure of large sums of money has been permitted it would be inequitable to correct at this time what was a mutual mistake, under the influence of which these enterprises have been pushed to completion.

In the case at bar for almost forty years both the city and the company concurred in the construction of this contract. In reliance upon this construction the company, with the knowledge and acquiescence of the city and its citizens, invested three or four millions of dollars. Can a property owner who has stood by without objection, who has profited by this investment, who has utilized these cars, who has availed himself of these facilities, be heard to say now that this ordinance was granted without authority or that this construction of it is wrong?

In

*State ex rel. vs. Janesville Co.*, 92 Wis., 496,

the court held such an estoppel good against the State. Referring to an estoppel arising out of the fact that a corporation had been allowed to proceed and expend large sums of money when the facts relied upon in the application for leave to bring the action to forfeit its franchise were notorious, the court says:

> Principles here maintained should be quite rigidly applied, where, as in this case, the corporation has not

> merely been allowed, but has been compelled by those chiefly interested and the real moving parties to proceed at great expense under the franchises sought to be annulled, for a considerable period of time, while the facts relied upon as grounds for forfeiture have been all well known.

The same doctrine is announced in

> *Spokane Street Ry. Co. vs. Spokane Falls*, 6 Wash., 521, 524.

We quote the single sentence:

> A municipal corporation should not be permitted to stand by and see large amounts of money invested in enterprises of this sort by persons who act under the mistaken view that they have legal authority.

If further authority is necessary upon this question the following extract from the

> *Street Railway Cases*, 73 Iowa, p. 522,

should conclusively settle it. There it was contended that the original ordinance was void and that there were defects in its re-enactment, and it was thus sought to sustain the proposition that it never became a valid ordinance. The court says:

> For the purposes of the opinion it may be conceded that what purports to be an ordinance did not take effect as such, but it appears to us that it has the force at least of a resolution so far as the provision in question is concerned. Plaintiff's assignor acted upon it and expended money, not only in laying additional track, but in paying for street paving. We feel justified in saying that every one interested thought the ordinance of 1865 was ratified and binding upon the city and the plaintiff's assignor, and that what was done afterward was done with that understanding.

Certainly during the eighteen years that elapsed after this opinion was filed and before the present controversy

arose, every one understood that this ordinance was in force and binding upon both the city and the appellee, and pursuant to this understanding the city made its requirements and the company complied with them. Pursuant to this understanding, it spent its money with the acquiescense of the city and every one else. Under these circumstances we submit that both the city and its citizens are estopped from asserting that the ordinance is void or that the rights under it have expired.

In the case of

*Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234,

which is cited by the appellant, the facts were radically different. There the ordinance was for the expressed term of twenty-five years. The statute affirmatively limited the power of the city to twenty-five years. There was no question as to the validity or construction of this ordinance. Not a dollar had been expended in reliance upon any claimed right. There was no question of estoppel. The company claimed an extension by implication. The essential element of estoppel, namely, silence on the part of the city with knowledge that the company was spending money in reliance upon something, is absolutely lacking. The Cedar Rapids case is like that of a tenant, holding over after he admits his lease has expired; while the case at bar is like that of a tenant in possession, under a claim that his lease has not expired, who is permitted and required by his landlord to make large expenditures in reliance on the belief that he has rights in the property.

Counsel assert that an estoppel is not pleaded. This is a misapprehension. See paragraphs 7, 27, 30, 31, and 32 of the bill. It would be more nearly accurate to say that the answer does not deny it.

## VIII.

*The power of the city to make an unlimited grant is beyond question.*

As we have already seen, the adjudication that this ordinance constitutes and is a valid contract between the city and the present company eliminates this question. Counsel, however, discuss it at length in their brief and we consider it in answer to what is there said, though we believe that upon the determination of the *Street Railroad Cases* by the Supreme Court of Iowa, in 1887, it ceased to be more than a mere academic question. Before referring in detail to the contentions of counsel, we take up generally the power which the statutes of Iowa confer upon cities as to this matter.

At the date of the original enactment of the Turner ordinance, December 10, 1866, the city had only the ordinary, general powers over its streets, and its power to make a permanent grant was, perhaps, debatable. By the code of 1873, however, the city was granted ample power over this subject.

Section 464 of this code provides:

> They shall also have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places, but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public places upon which such railway track is proposed to be located and laid down, has been ascertained and compensated in the manner provided for compensation of injuries received from the regrading of streets in section 470 of this chapter.

In

*Des Moines Street Railway Co. vs. Des Moines Broad Gauge Street Railway Co.*, 73 Iowa, 513,

the Supreme Court of Iowa unequivocally decided that this section, in connection with the other statutes which were then in existence, authorized the enactment of this particular ordinance.

This ordinance was either valid or invalid. As against its validity, as we have already seen, the city in these cases urged that it was unreasonable because it granted a perpetual right. The identical claim which is now asserted here, that it would in effect be exclusive, was urged there. In the face of this argument the Supreme Court decided that under this section the city had the power to enact this ordinance. We submit that this is a determination of the specific question that is presented by counsel, and forecloses any argument upon the question of power. Here we have more than a decision in general terms that this section authorizes an unlimited grant: we have a decision that it authorizes this particular unlimited grant that is now in controversy.

In the case that has just been referred to the Supreme Court of Iowa uses this language:

> Having reached the conclusion that under the section of the code above cited the power had been conferred *to make the contract in question*, we have to consider whether it appears that the city council, after the code took effect, ratified the contract which it had previously (and as we will assume without power) undertaken to make.

It then proceeds to the conclusion that conceding that the subsequent enactments had the force only of resolutions, they were sufficient to ratify and confirm the grant which is contained in the Turner ordinance.

After the passage of the ordinance of March 8, 1890, amending the Turner ordinance by authorizing the use of electricity as a motive power, this amendment was legal-

ized by Chapter 11 of the Acts of the 23d General Assembly of Iowa, which became effective April 29, 1890. This Act is as follows:

> SECTION 1. All cities and incorporated towns, including cities acting under special charters, shall have the power to authorize or forbid the construction of street railways within their limits, and may define the motive power by which the cars thereon shall be propelled, including animal, electricity, steam or other power, whether now known or hereafter utilized.
>
> SECTION 2. All ordinances or resolutions of such cities or incorporated towns heretofore enacted, granting to any person or company the right to propel its cars by electricity are hereby declared legal and valid, provided that nothing in this act shall affect present or pending litigation or any vested rights.

The Turner ordinance as amended by the ordinance of March 8, 1890, was enacted prior to the time that this act of the legislature became effective, and it granted the right to propel cars by electricity, so that it is by this act expressly declared legal and valid.

> *Louisville Trust Co. vs. City of Cincinnati*, 76 Fed., 296.

sustains our contention that this legalizing act removes all question as to the sufficiency of the powers of the city.

In this connection we also call attention to

> *Baltimore Trust Co. vs. Baltimore*, 64 Fed., 153.

This involved the same ordinance which was the subject of the litigation in *Lake Roland Street Railway Co. vs. The Mayor of Baltimore*, 77 Md., 352.

In the *Baltimore Trust Company* case the court refused to follow the decision of the Supreme Court of Maryland, and held that a grant without limit as to time is permanent; that power in the city to grant or refuse is power to make an unlimited grant, and that a curative act similar to the one just referred to foreclosed all argument upon the question of power.

Moreover, it has never been the policy of the State of Iowa to limit the term for which street railroad grants may be made. Section 464 of the Code of 1873 makes no reference to a limit as to time. The grant of power contained in the first section of the legalizing act that has been just referred to is absolutely unlimited. These two sections are re-enacted as section 767 of the Code of 1897, which is as follows:

> Cities and towns shall have the power to authorize or forbid the construction of street railways within their limits and may define the motive power by which the cars thereon shall be propelled; and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places.

Section 775 as to poles and wires, provides as follows:

> Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires and the poles and other supports thereof, by general and uniform regulation and to provide the manner in which and the places where the same shall be placed upon, along or under the streets, roads, avenues, alleys and public places of such city or town, and may divide the city into districts for that purpose.

In none of the sections which relate to street railroad grants is there a time limit. That it was the affirmative intention of the legislature not to impose such a limit is made clear by the fact that as to some other public service corporations, namely, water companies, gas works and electric lighting plants, a limit of twenty-five years is expressly provided by section 720 of the Code of 1897 in the following language:

> They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-

five years and may renew or extend the term of such grant; but no exclusive franchise shall be thus granted, extended or renewed.

By the Code of 1851 of Iowa telegraph companies were by legislative enactment authorized to construct their lines in the streets and highways of the State, there being no limit as to time upon the grant, and this is the present law. By chapter 104 of the Acts of the Nineteenth General Assembly of the State of Iowa, effective in 1882, this law was amended so as to include telephone companies, and, in a recent case, this grant, which is without limit as to time and is a direct grant by the legislature, has been sustained by the Supreme Court of Iowa.

*Chamberlain vs. Iowa Telephone Co.*, 118 Iowa, 619.

The legislature, in adopting the Code of 1897, which was a codification of the then existing laws, re-enacted the limitation upon the term for which grants might be made to water works, gas companies, and electric light companies and authorized cities to make telephone grants which had theretofore been based upon a direct grant from the legislature, but limited the time of these grants, but it left the power to grant railroad and street railroad rights without limit as to time.

It will be noted that in section 464 of the Code of 1873 and also in section 767 of the Code of 1897, cities and towns are granted power "to authorize or forbid the location and laying down of tracks for railways and street railways on all streets," etc. The power as to railways and street railways is granted by the same verb in the same phrase of this sentence and is identical as to both of these classes of tracks. No one will contend for a moment that this word "authorize" does not vest cities with the power to grant permanent rights to railroads. The Supreme Court of Iowa has decided that such a grant to a railroad must be

presumed to be permanent and that upon that basis the damages to an abutting property owner must be assessed.

See

*Pratt vs. R. R. Co.*, 72 Iowa, 249.
*Fowler vs. Des Moines & Kansas City Railway Co.*, 91 Iowa, 533, 540.

The whole matter is disposed of by the case of

*O'Neil vs. Lamb*, 53 Iowa, 725.

In that case the Supreme Court of Iowa says:

> Regarding section 464 of the Code in full force and effect, the city thereby was vested with full power and authority to grant the defendant the right to construct and operate the road upon complying with the provisions of the statute in relation to abutting owners. The requisite power having been created, all else was a matter of detail and within the discretion of the city, subject only to equitable control and proper police regulations.

A case squarely in point is

*City of Des Moines vs. Rock Island R. R. Co.*, 41 Iowa, 569.

The city had built a toll bridge. It granted to the railroad company's assignor the right to occupy it, the grant being in the following language:

> That there is hereby granted to the Des Moines, Indianola & Missouri River Railroad Co. the right to lay and maintain a track and railroad over and along said bridge across the Racoon river at Seventh street in the city of Des Moines, and to operate the same over said bridge subject to the following regulations:

Later the city, by ordinance, attempted to require tolls for the locomotives crossing the bridge, and the cited case was brought to recover such tolls. As to this grant without

limit as to time the court says with reference to the matter of power:

> That the city had power to pass the ordinance in question we entertain no doubt. We discover no express limitations upon its power to contract with reference to that subject-matter.

Suppose that the word "authorize," which confers this power upon the city were adopted by the city in the ordinance making the grant, and that the ordinance read: "Be it ordained that the Des Moines Street Railway Company, its successors and assigns, are *authorized* to lay, maintain and operate single or double tracks for street railways in the streets of the city of Des Moines," etc., would there be any question as to the construction to be put upon such a grant as this? Could it be contended that this was a grant for a limited term? Could any word more completely grant authority to construct and maintain tracks than the word "authorize?" Could anything be added to it?

Certainly it could not be successfully maintained that in such a case where, in making its grant, the city used the very word that was used by the legislature in delegating the power to the city, the city had exceeded this delegated power. By the terms of the Turner ordinance consent, permission and authority are vested in the grantee. It is authorized to maintain these tracks.

When the legislature empowered the city to authorize railroads and street railroads without imposing any limits upon this power, it left to the city to determine in its discretion the time for which the authority should be granted.

In *Blair vs. Chicago*, 201 U. S., 400, 457, the court discusses this word "authorize" and says:

> The company must be "authorized" by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. To au-

thorize is to "clothe with authority." Webster's Dictionary; "To give legal power to." Century Dictionary. It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets. *This power of the city, in the absence of language in the statute excluding the authority and reserving its exercise to the State, necessarily includes the right and fixes the time for which the streets may be used.* This doctrine was, we think, correctly stated by Judge Lurton, in delivering the opinion of the Court of Appeals in *Louisville Trust Co. vs. Cincinnati*, 76 Fed. 296, 308, "The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enters into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. *This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy.*"

When it is borne in mind that at the time this authority was granted in 1873 there was nowhere in the laws of Iowa a suggestion of any limitation upon a grant to any public utility and that, as Judge Dillon says, the custom was to grant permanent rights, and that the same authority is granted as to both street railroads and railroads, whose grants are necessarily permanent, no possible room for doubt as to the extent of the power conferred by the word "authorize" remains.

An instructive opinion in this connection is that rendered by Mr. Justice Brewer in the

*Kansas City Water Works Case*, 65 Fed., 691.

After holding the grant there in controversy to be perpetual because its term was unlimited, he took up the question of the power of the city to make the grant. The words of the statute which conferred the power on the city were:

"May contract with or grant to any person, company or corporation the right to lay and maintain water mains under, along, upon and across the streets alleys and other public grounds of such city for the purpose of conveying water to any city in this State or any other State.

Mr. Justice Brewer says:

The grant of power in this section is general and without limitation. If this were the only section bearing on the matter, it would be beyond question that the city had the power to make a permanent contract for the use of its streets.

In

*State vs. Commissioners*, 61 N. J. L., 470, and
*State vs. Traction Co.*, 62 N. J. L., 386,

both involving the same transaction, it is held that power to authorize street railroads is power to make a permanent grant.

An elaborate consideration of this question will be found in the *Detroit Street Railroad Cases*, decided by the Circuit Court of Appeals of the Sixth Circuit.

See

*Detroit Citizens' Street Railway Co. vs. City of Detroit*, 64 Fed., 628.

These cases were later before this court and the opinion is reported in 184 U. S. We call especial attention to pages 635 *et seq.* of the decision of the Circuit Court of Appeals. We quote the following sentence from page 642:

If this view upon the limitations of the legislative power of the State be sound, it must follow that when the State acts in the only way it can act—by conferring upon the municipality the powers necessary to the establishment of such public facilities of intra-city travel—and does this in general terms, *limitations upon the discretion of the municipality in the exercise of that power ought to be plainly apparent*

*before the court will be justified in declaring their existence.*

In this same opinion it is said:

> The evils to be apprehended from long grants or easements to such companies seem to us not to be such as to justify a constructive limitation on that account. The power to make an irrevocable contract giving an easement of some considerable duration is an inseparable incident to any scheme for furnishing such public facilities as a street railroad. The duration of such grants must be a question of discretion to be exercised by some public authority. That the exercise of that discretion should be left to the local government as a question of purely local interest seems most consistent with the proprieties of the case.

Again, in this same opinion, it is said:

> The consent, when given by ordinance duly passed, constitutes a grant of a right of way on and over the streets named, and constitutes a contractual ordinance conferring an easement which is irrevocable. By such an ordinance an incorporeal hereditament is created and vested in the grantee.

This opinion indicates that in jurisdictions where street railroads are regarded as a legitimate street use as distinguished from those in which the contrary doctrine prevails, there results a difference in the effect of general authority over the streets. The doctrine of the class of cases which holds that general control over the streets is not sufficient to authorize the grant of a definite street railroad right is predicated upon the assumption that a street railroad is an additional servitude and not a legitimate street use.

In

*Blair vs. Chicago*, 201 U. S., 486,

the court says as to grants under a mere power of general control over the streets:

> The cases in the State courts are much divided as to the right of a municipal corporation, because of its charter power of controlling the streets, to grant the use thereof to a street railway company. Some of the cases are collected in *Detroit Citizens' Street Railway Co. vs. Detroit*, 64 Fed. Rep., 628, 637.

A large number of cases of this character has been cited by the appellant in the case at bar. These cases could not properly be invoked here even if this power had not been expressly delegated, because the Supreme Court of Iowa has unequivocally committed itself to the doctrine that a street railroad, operated by electricity transmitted by overhead poles and wires, is not an additional servitude, but is merely an improvised use of the street for street purposes, and that it is such a use as is authorized by the easement in the public to use the ground in question as a roadway.

See

> *Snyder vs. Fort Madison Street Railway Co.*, 105 Iowa, 284.

In

> *People ex rel. Woodhaven Gas Co. vs. Deehan*, 153 N. Y., 528,

under a statute authorizing the organization of corporations for the purpose of furnishing gas to cities and for the purpose of laying the conductors in the streets and highways with the consent of the municipal authorities it is stated that the grants contemplated were generally in perpetuity.

> *Seattle vs. Columbia, etc., Railroad Co.*, 6 Wash., 379,

was a case where a power of the city to make a perpetual grant of a right in the streets was involved. The city was authorized

> "to authorize or forbid the location and laying down of tracks for railway and street railways on any and all streets, alleys and public places within the city."

This is almost the identical language of the Iowa statute. It was held that this grant having been acquiesced in for a number of years, no question of power could be raised.

Without further elaborating upon this matter, we submit that the statutes of the State of Iowa granted to the city of Des Moines ample power to make a permanent grant of the street railway company.

## IX.

*The argument of appellant that the city was without authority to make the grant in question.*

Counsel for appellant predicate their argument that the Turner ordinance as a permanent grant was beyond the power of the city of Des Moines, upon two arguments, viz: that the statute in question did not attempt to delegate this power to the city, and further that such a grant is contrary to sound public policy and therefore void.

The first argument is based upon a long line of authorities cited as sustaining the proposition that the power to make a grant without limit as to time must be expressly delegated by the legislature. It is unnecessary to review these authorities. That authority to authorize and forbid, conferred by the Iowa statute, is such a delegation of this power, is demonstrated by the authorities which we have already cited in support of this proposition. The soundness of the rules announced in these authorities is not questioned by any case which is cited by counsel for the appellant.

Their second argument is neither sustained by the authorities which they cite nor by sound reason. It is the argument for a "constructive limitation" which was denied in the Circuit Court of Appeals in the Detroit case. There is nothing in the contention that a grant in perpetuity is against public policy. Such a question cannot possibly arise in such a case as this. If the city has not power

to make the grant, then the grant is *ultra vires* and fails without reference to any question of public policy. If the city has power to make the grant, it has power because the legislature has conferred it. By granting this power the legislature has defined the policy of the State and this declaration of its policy is final so far as the courts are concerned.

This rule has been very recently recognized by the Supreme Court of Iowa in

*Board of Park Commissioners vs. Diamond Ice Co.*, 130 Iowa, 603.

There the court says:

> It is suggested that if the act is constitutional, it is against public policy and is therefore void. A legislative act, if constitutional, declares in terms the policy of the State and is final so far as the court is concerned.

In

*Kahn vs. Kahn* 125 Iowa, 145, 153,

the same doctrine is thus stated:

> It is contended also that it would be against public policy to permit the defendant to derive advantage from her criminal act. But the public policy of the State is the law of that State as found in its constitution, its statutory enactments and its judicial records (*People vs. Hawkins*, 157 N. Y., 121). And when such policy, touching a particular subject, has been declared by statute, as in this case, it is limited by such statutes, and the courts have no authority to say that the legislature should have made it of wider application.

The argument of counsel that the words "to authorize or forbid" should not be given by the courts their ordinary interpretation because counsel contend this would be against

sound policy, amounts, in its final analysis, to nothing more nor less than that the courts are at liberty, when the legislative declaration of the policy of the State does not accord with their notions, to defeat it by imposing a "constructive limitation" upon the meaning of the words adopted by the legislature in declaring this policy.

It is very aptly said in

*Citizens' Water Co. of Bridgeport vs. Bridgeport Hydraulic Co.*, 55 Conn., 1, 16:

> The plaintiff has pressed upon us the consideration that a decision of this case in behalf of the defendant is the protection of a monopoly, and that a monopoly is odious. But this argument forgets the fact that it is the judicial duty to preserve contracts inviolate rather than to destroy monopolies. Communities may endure monopolies, but they cannot endure the violation of contracts.

Applying this to the case at bar, the argument of the appellant ignores the fact that it is the duty of the courts to enforce the public policy declared by legislative enactments and not to curtail or limit what the legislature has said in order to make it conform to their own views where these do not accord with the legislative expression.

The authorities which are cited by counsel are, with a single exception, cases which have arisen out of exclusive grants or where the municipal power was simply the general authority to control and regulate the use of its streets, without an express grant of power to authorize or forbid street railways.

Notwithstanding what is said in these cases, in the *Street Railroad Cases* in the 73d Iowa, which have been so frequently referred to, the Supreme Court of Iowa sustained an exclusive grant under this ordinance for the term of thirty years, although it suggests that a permanent exclusive grant might not be valid, saying in this connection

> It may be conceded that the future growth and wants of the city cannot be foreseen. The most that

> can be said is that they may ordinarily be predicated with reasonable approximation for a limited time. And thus we are inclined to think it follows that an ordinance providing for an exclusive right in perpetuity, however necessary it might be to contract for the service involved in the exercise of the right would be unreasonable and might be declared void.

It will be remembered that in that case the very argument which we are now considering was presented as a basis for the contention that this ordinance was void. In the city's petition for a rehearing in this case, set out at page 76 of the record, the city says, quoting from page 677:

> But passing this consideration, we assume that no ordinance of this kind is valid if it is (not) in accord with the public interests and sound public policy—in other words, an ordinance in violation of public policy is unreasonable, and we urge the following considerations that enter into this question and should receive the careful consideration of the court in determining them.
>
> 1. It gives to the plaintiff company the right to perpetuity to occupy all the streets and alleys with single or double tracks of the street railway and requires that they shall be operated by animal power only. There is no limit of time upon this right. * * * In its opinion the court has evidently overlooked this fact, and the case is treated as though the grantee's rights in the streets were limited to thirty years, but the grant is contained in the first section and is as sweeping as language can make it.

In the face of this argument the court adhered to its conclusion that this ordinance was valid, and rendered the decree to which we have referred granting its injunction without limit as to time.

Counsel state in their argument that in general street railroad rights are limited as to time. This statement is neither sustained by any proof in the record nor is it in accord with the facts.

This suggests an important consideration which should not be overlooked in connection with the discussion of this matter. The question is whether this contract was valid when the contract was made. The question is what the conditions were then and not what the conditions are today. If this matter is material at all, the question is whether the practice at that time was to grant rights unlimited as to time and not whether that is the practice now. The argument for the appellant speculates as to conditions that may arise some time in the future which would render it desirable for the city to terminate this grant. It does not point out any specific public inconvenience, but contents itself with general speculations. It is not pretended that the public convenience does not now require the continuance of the exercise of this right, or that, if it were terminated, it would not necessarily make a new grant to secure a continuance of the service. Moreover, if the argument of the appellant is sound, it points out the antidote for this condition if it should ever arise, in its reference to the reserved power over corporations and corporate franchises for which provision is made in both the constitution and the statutes of the state of Iowa.

But aside from this question of reserved power, this entire proposition of counsel is based upon a misapprehension. A grant in perpetuity is, *ex necessitate*, subject to the limitation that the grant can continue only so long as the exercise of it will confer a public benefit. If transportation by street railroads should be superseded by some other, better or more convenient method, so manifestly better as to destroy the value of street railroads as a public utility, they would become nuisances and the right to maintain and operate them would cease. As Judge Sanborn said in the *Omaha Bridge Cases*, 51 Fed., 319, if a contract is beneficial to the public interests, its length is but an added argument in its favor.

A case especially pertinent here is

*Capdevielle vs. New Orleans & S. F. R. Co.*, 110 La., 904.

The city of New Orleans had granted a perpetual but not exclusive right in certain streets. The court says:

> As related to this perpetual grant urged by plaintiff, we can only say further that it can only be perpetual to the extent that the defendant company will comply with its obligations which will be onerous enough without seeking to exercise right of ownership, an interference to which it will not be entitled.
>
> It cannot be permitted to misuse a grant or to run its roads without regard to the public.
>
> There is no reason to infer that it will be permitted to run, like the brook, forever, without the least regard to conditions.
>
> Stipulations and conditions cannot be disregarded by either party and this, it seems to us, will obtain desired protection at all times and divest "perpetuity" of the odium it gives rise to when the right is uncontrolled and uncontrollable by any one save the grantee of the use.

There is but one case cited by counsel which is sufficiently analogous in its facts to afford any support to their contention. It is

> *Lake Roland Elevated Railway Co. vs. City of Baltimore*, 77 Md., 352.

The identical question which was involved in that case was presented in

> *Baltimore Trust & Guaranty Co. vs. The Mayor of the City of Baltimore*, 64 Fed., 153.

After the case between the city and the street railway company had been decided adversely to the company, the trustee for the bondholders brought this action in the United States Circuit Court.

In this case the court says:

> I think that municipal corporations invested with full power to control and regulate the use of their streets, do not exceed their powers in making irrepealable contracts not exclusive in character for the use

> of said streets for purposes relating to the public comfort and convenience; and also that a legislative grant, made either directly by the legislature or indirectly through a municipal corporation duly authorized so to act, constitutes a contract between the parties thereto, the terms of which cannot be altered without their mutual consent, except so far as the right to alter, amend or repeal is expressly reserved in the grant itself or existed in constitutional or legislative provisions at the time of its passage. Were this not so, there would be but little security for investments made on the faith of such grants and no inducement to those controlling capital to make improvements absolutely necessary for the health and happiness of the people and for the progress and prosperity of the country. Justice requires that such legislative enactments, when the grantees thereof have accepted the same and acted thereunder, should become absolute and irrevocable contracts which neither party thereto will be permitted to revoke nor allowed to disregard or add conditions thereunto more onerous than those first imposed.

The conclusion of the federal court with reference to this matter is sustained, not only by many of the cases which we have cited in support of the proposition that a grant without a limit as to time is permanent, but by numerous other authorities as well.

Before taking up these authorities we desire to call attention to an inherent vice in counsel's argument. They contend that a grant without limit as to time is not permanent. They omit to suggest how the duration of such a grant is to be determined. Each of these grants is a contract by which the grantee acquires the right to occupy the streets. As to these grants it is said by the Court of Appeals of New York in

> *People ex rel. Gas Co. vs. Dechan*, 153 N. Y., 528, 533:
>
> Such a grant is generally in perpetuity or during the existence of the corporation or at least for a long

> period of time and should be given effect according to its nature, purpose, and duration.

The exercise of these grants involves the permanent investment of large sums of money. If a grant without limit as to time is not in fact without limit as to time, there is no means for ascertaining how long the right will continue. The grant amounts to nothing more than a license revocable at the pleasure of the municipality. The argument of counsel, therefore, involves the contention that these grants contemplate that such investments will be made with absolutely no assurance of the stability or continuance of the right which is at their very foundation. As is said in the *Baltimore* case, under these circumstances capital would absolutely refuse such investments, and the public would be required either to do without these utilities or to resort to municipal ownership.

The conclusion of the Maryland court stands alone, unsupported by any authority.

The Supreme Court of Washington, in

> *Seattle vs. Railroad Co.*, 6 Wash., 379,

says upon this question, at page 392:

> Property rights acquired under and by virtue of franchises thus granted are perpetual unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular as well as an individual may. On the contrary, well-recognized principles of justice require that it should be so bound to the end that property right may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for, should it become necessary to thereafter undo the work and terminate the rights granted and to take the property of the corporation acquired in pursuance and by virtue thereof, it may be so under the exercise of the power of eminent domain

and upon making compensation; and this is a sufficient protection for the rights of the city and one which at the same time affords protection to the rights of the respondents.

The Court of Appeals in the State of New York, in

*Trustees of Southampton vs. Jessup*, 162 N. Y., 122,

instead of saying that *prima facie* a permanent right is against public policy, says:

> A franchise is a grant by or under the authority of government conferring a special *and usually a permanent right* to do an act or a series of acts of public concern and, when accepted, it becomes a contract and is irrevocable unless the right to revoke is expressly reserved (*People ex rel. vs. Utica Insurance Co.*, 15 Johns, 358, 387; *Bank of Augusta vs. Earle*, 13 Peters, 519, 595; *California vs. Pacific R. R. Co.*, 127 U. S., 1, 40).

It says further as to the privilege there in controversy:

> It is a special privilege because it is not of common right; is permanent because there is no limitation as to time, and is of public concern because it relates to the public domain.

In New Jersey in

*Phillipsburg Electric Co. vs. Phillipsburg*, 66 N. J. Law, 506,

permanent rights are sustained, the court saying:

> We think this question is settled by the cases of *Hudson Telephone Co. vs. Jersey City*, 49 N. J. L., 303, and *Suburban Electric Light and Power Co. vs. East Orange*, 41 Atl. Rep., 865, which hold that permission granted by a common council under like circumstances to this was, after acceptance and expenditure of money under it, irrevocable.

Perpetual grants were sustained in

*Suburban Electric Co. vs. Inhabitants of East Orange*, 41 Atl., 865, affirmed in 44 Atl., 628, and not officially reported.

It will be observed that this case is approved in the Phillipsburg case, *supra*.

In

*County of Floyd vs. Rome Street R. R. Co.*, 77 Ga., 614,

a bridge occupied by street railroad tracks was destroyed. When the bridge was restored, the street railroad's attempt to reoccupy it was resisted by the city. The court says:

> Where the statute authorizes the laying of rails on a highway with the assent of the municipal body, such assent, when given, is irrevocable.

In

*Nash vs. Lowry*, 37 Minn., 261,

the Supreme Court of that State sustained an irrevocable grant where the city was without authority when the ordinance was first enacted, but the ordinance was later ratified by the legislature.

The case of the

*Citizens' Water Co. vs. Bridgeport Hydraulic Co.*, 55 Conn., 12,

already referred to upon another matter, sustains a grant which was to continue so long as the company furnished adequate service to the public. It was in this case that the court said that communities might endure monopolies, but could not endure the violation of contracts.

In

*Belleville vs. Citizens' Horse Railway Co.*, 152 Ill., 171,

it is held that a right to occupy a street, when acted upon, becomes a valid and irrevocable contract.

In

*Denver St. Railway Co. vs. Denver City Railway Co.*,
2 Col., 673,

an exclusive and apparently perpetual right to operate a horse railway on the streets made by a direct legislative grant, was upheld.

Upon this proposition the authorities are all one way. Aside from the decision of the Supreme Court of Maryland in the *Lake Roland Elevated Street Railway* case, there is not a reported decision of a court of last resort which attempts to overthrow a permanent non-exclusive grant on the ground that it is against public policy. On the contrary, the validity of such grants is recognized in a very large number of cases.

As a matter of fact, permanent grants are not against such sound public policy. Such grants are *ex necessitate* subject to limitations. The public possesses broad regulatory powers. The right to regulate rates is absolutely established. The police powers are broad and comprehensive. The right cannot continue after its exercise ceases to be a public benefit. As a practical proposition it is impossible to imagine circumstances under which a public utility would insist upon the exercise of its rights after it had ceased to serve the public. It would be in a position where it could derive no income from the exercise of these rights or no substantial income. The investment would immediately become unprofitable. Ordinary business necessities would require either a new grant modifying the old one to make it conform to the existing conditions or else an abandonment of the old one. If street railroads become no longer practicable as methods for urban transportation, people will not patronize them and the cars will not be operated because, to operate them would render the companies insolvent.

On the other hand, a permanent and stable right is an absolute essential to efficient and economical service. If

the investment is at the hazard of every caprice of a city council, this hazard is an element that must be taken into account in fixing the charges for the service. If extensions are to be made, if the plant is to keep up with the requirements of the public, there must be some assurance that it will be permitted to do business over the new lines that are built and with the new equipment that is furnished; otherwise, such investments will not be made. Sound public policy does not require limited street railroad grants; it does require permanent grants. The interests of the public are fully protected by the power which the State has to regulate and by its police powers as well as by what inheres in the business situation.

The statement quoted by counsel from

> *Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234,

is purely dictum. This statement was made in a case where the franchise was limited to twenty-five years and where the statute with reference to water works prohibited the granting of a franchise for a longer term and also prohibited the granting of an exclusive franchise. If this statement be taken as a general statement it is clearly one without support in the authorities and directly against the overwhelming weight of them. If it is limited to the facts of that particular case and to the facts set out in the numerous cases cited in the opinion to sustain it, which were all of them exclusive grants, we have no quarrel with its soundness, but it is wholly immaterial.

## X.

*The other ordinances.*

Counsel in Division V. of their brief, page 122, enumerate a large number of ordinances other than the Turner ordinance which grant rights in the city of Des Moines and

which are now held by the Des Moines City Railway Company. These ordinances, and especially the Broad Gauge ordinance of December 20, 1887, which is set out as Exhibit 57 (Trans., p. 138) are broad enough to sustain every right which the company is now claiming. This ordinance of December 20, 1887, will expire by its terms on December 20, 1912.

It is true, as counsel contend, that the company has not been exercising the rights which it holds under these ordinances. It is gratifying to the appellee to observe that the appellant accepts the acts of the parties as conclusively determining this question. The contention of counsel, that the rights of the appellee under these ordinances have been abandoned, is another matter, and is unwarranted by the testimony. The freight ordinance (Ex. 51) was not enacted until February 4, 1895, which was between five and six years after the reorganization in 1889, and some five or six years subsequent to the time when counsel claim this abandonment was had. In that ordinance the city recognizes the other ordinances as in force, and expressly states that the present company was then the assignee of all of them. This ordinance says in section 1:

> That the tracks, railways and cars now or hereafter owned or operated by the Des Moines City Railway Company (the assignees of the Des Moines Street Railway Company, and all other companies to whom this city and the several cities and towns adjacent thereto and now embraced in and forming a part of the city of Des Moines, heretofore granted certain street railway franchises) may for the period, etc.

This affirmative recognition of the present company as the holder of these rights at that time is inconsistent with the present contention of the city that five or six years prior thereto they had been surrendered or abandoned.

Note in this connection the very significant fact that, as shown by the record, the present company was not organized until 1893, five years after it is now claimed that

these rights were abandoned. If they had been abandoned by its predecessor, would they have been assigned to this company, and would the city have thus formally recognized the fact of such assignment? Abandonment is always a matter of intention. The record to which we have referred shows that the parties did not intend, although there had been *non user*, to abandon these rights. The company had the right to accept two grants or three grants or four grants of this easement just as a private individual would have the right to accept from another private individual two or three or four leases running for varying terms.

In

*Town of Golconda vs. Field*, 108 Ill., 419,

there was a grant of an exclusive right to operate a ferry, and thereafter a right was granted to operate it for twenty years. The court held that the owner of the ferry had the right upon the expiration of the twenty years, to claim under the original grant since he had the right to claim under both of them.

*Chamberlain vs. Iowa Telephone Co.*, 119 Ia., 619.
*State ex rel. vs. Nebraska Telephone Co.*, 127 Ia. 194,

were both cases where there had been a legislative grant of a permanent telephone right, thereafter a grant for a limited term by a city ordinance, and finally upon the expiration of the grant by the city ordinance, a return to the rights conferred by the legislative grant. In each of these cases the supreme court of Iowa sustained the right of the telephone company to continue under the permanent legislative grant after the other grant had expired.

Authority to occupy streets not named in the original ordinances could be granted by a vote of the council without a vote of the people after the code of 1897 required such a vote in connection with grants of rights to maintain poles and wires.



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*Thurston vs. Huston*, 123 Ia., 157.

These ordinances as well as all other general ordinances covered the enlarged city when its boundaries were extended in 1890.

*Gas Light Co. vs. St. Louis*, 46 Mo., 121.

This doctrine is recognized in

*Blair vs. Chicago*, 201 U. S., 400, 489,

where it is said:

> The ordinances of the city extend over the annexed territory immediately upon annexation. *Illinois Central Ry. Co. vs. City of Chicago*, 176 U. S., 646, and the limitations of the ordinances apply to the annexed territory.

The holding in the case referred to, *Illinois Central Ry Co. vs. City of Chicago*, was that a provision of the company's charter requiring the consent of the city to the location of the tracks was not limited in its effect to the city as it existed when the charter was granted, but was applicable in territory thereafter made a part of the city.

The argument of counsel upon these propositions ignores the most significant fact, that these ordinances were reenacted in 1900 as then in force as a part of the revised ordinances, ten years after the city was enlarged. This precludes any claim that they had been abandoned, or that they did not include the enlarged city.

In this connection counsel suggest in their argument that certain of these ordinances contain no words of assignability and are therefore not assignable. A complete answer to this contention is found in the extracts we have already made from the freight ordinance, showing an express recognition and assent on the part of the city to the assignment of all of these ordinances to the present company. It will not be contended that a municipality may not, in the absence

of words of assignability, consent to an assignment. That such rights as these are assignable is held in

*New Orleans, etc., Ry. Co. vs. Delamore*, 114 U. S., 501.
*Detroit vs. Detroit Citizens' St. Ry. Co.*, 184 U. S., 368.
*Louisville Trust Co. vs. City of Cincinnati*, 76 Fed., 296.
*Mayor of Knoxville vs. Africa*, 77 Fed., 501.
*Detroit Citizens' Street Ry. Co. vs. Detroit*, 64 Fed., 628.
*Light & Power Co. vs. Tacoma*, 17 Wash., 661.
*City Ry. Co. vs. Citizens' St. Ry. Co.*, 166 U. S., 557.
*Morgan vs. Louisiana*, 93 U. S., 217.

## XI.

*This case presents a Federal question and the jurisdiction is clear.*

The circuit courts of the United States have original cognizance of all suits of a civil nature "arising under the Constitution or laws of the United States."

The recent case of

*Northern Pac. Railroad Co. vs. Duluth*, 208 U. S., 583,

obviates the necessity for any elaborate consideration of this question. A viaduct had been constructed over certain tracks of the railroad under a contract between the railroad and the city, whereby the railroad contributed $50,000 to the expense of the construction of the viaduct, and the city undertook to maintain it for the period of fifteen years. This contract was dated September 2, 1891. In 1903, the viaduct and its approaches having become dangerous, the city of Duluth acted within the power conferred on it by law to require railroad companies to construct approaches and viaducts at their own expense, and after investigating

the matter approved plans prepared by the city engineer, and June 13, 1903, passed the following resolutions:

> *Resolved*, That the repairs set forth in said specifications are necessary and proper and are demanded by the public safety and convenience.
>
> *Resolved further*, That said repairs are reasonable and practicable for the repair of said viaduct and its approaches; and that said repairs as set forth in said specifications are hereby adopted and approved.
>
> *Resolved further*, That this council does hereby demand that the Northern Pacific Railroad Company immediately proceed to repair said viaduct and approaches in accordance with said specifications.
>
> *Resolved further*, That a copy of this resolution be forthwith served upon the Northern Pacific Railway Company in the same manner as service may be made of summons in a civil action by the city clerk.
>
> *Resolved further*, That in the event of the failure or refusal of said company to comply with such demands that the city attorney be and he is hereby instructed to institute such action or actions as to him may seem proper to compel the said railway company to make such repairs or such portion thereof as the court may determine it is legally liable to make.

After distinguishing

> *St. Paul Gas Light Co. vs. St. Paul* 181 U. S., 142, and
>
> *City of Dawson vs. Columbia Avenue Savings Fund Safe Deposit Title & Trust Company*, 197 U. S., 178,

upon which the appellant relies, the court holds that this resolution presents a case of a law in violation of the obligation of contract, saying:

> We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legislation which deprives one of the benefit of a contract or adds new duties or obligations

thereto, necessarily impairs the obligation of the contract, and when the State court gives effect to subsequent State or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court (*New Orleans Water Works Co. vs. La.*, 185 U. S., 336, 350, 351). And this jurisdiction has been frequently exercised in cases of municipal ordinances having this effect upon prior contract rights (*Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S., 65, 81; *City of Cleveland vs. Railway Co.*, 194 U. S., 517). As was said in *City of Dawson vs. Columbia Avenue Savings Fund Safe Deposit Title & Trust Company*, 197 U. S., 178, it is not always easy to determine on which side of the line a given case may fall. But recurring to the resolution in this case we are of the opinion that it is legislative action which impairs the obligation of the contract, if the contract is of binding force, which is a question to be determined upon the merits. * * * This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deem to be necessary. It requires legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen years and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this legislation does, is to require the railroad to incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming, for jurisdictional purposes, that the company had a valid claim of contract, it was impaired by the legislation of the city in question. We therefore think there is jurisdiction in the case.

In the case at bar the resolution not only denies that any contract exists, but it requires the company to destroy its property, and to remove its tracks from the streets; it changes the legal status of the company; it makes it, if the resolution is valid, a trespasser; it subjects it to prosecutions for maintaining a nuisance. Its effect is not only to impair, but to destroy these contract rights by depriving the company of their benefit. It not only imposes an expense, but it substantially destroys all of the property in which the company's capital is invested. The duty that it enjoins of removing the tracks is an affirmative duty. It might be enforced by mandamus, by a mandatory injunction, by indictment, or by the police forces of the city, without legal proceedings.

*Mercantile Trust & Deposit Co. of Baltimore vs. City of Columbus*, 203 U. S., 311, 322,

was a case where the municipality had enacted an ordinance contemplating the construction of a municipal water plant where there was a private company operating under an exclusive grant. The court says:

> In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created and their performance provided for by the ordinances and act. The act of the legislature aided the city by granting it power to itself erect water works and to issue bonds in payment of the cost thereof, and the city was proceeding to avail itself of the power thus granted when its progress was arrested by the filing of the bill in this case and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in *Walla Walla City vs. Walla Walla Water Co.*, 172 U. S., 1; *Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S., 65, again reported 202 U. S., 453; *Davis, etc., Co. vs. Los Angeles*, 189 U. S., 207; *Knoxville Water Co. vs. Knoxville*, 200 U. S., 22.

In

*Shoshone Mining Co. vs. Rutter*, 177 U. S., 507,

this court says that the suit must, in part at least, arise out of a controversy in regard to the operation and effect of the constitution, and that it must appear that it involves a dispute or controversy as to a right which depends upon the construction or effect of the constitution.

In

*Saginaw Gas Light Co. vs. Saginaw*, 28 Fed., 529,

the opinion was written by Mr. Justice Brown. The city having granted an exclusive gas ordinance, passed a resolution accepting a proposition from another company to erect a plant in the city. The jurisdiction was sustained.

*Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S., 65,

arose out of a resolution in the following language:

> *Resolved*, That the mayor be and is hereby instructed to notify the Vicksburg Water Works Company that mayor and aldermen deny any liability upon any contract for the use of the water works hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; that the city attorney take such action as shall be necessary to determine the rights of the city in the premises.

The city also commenced a suit to cancel the ordinance. The legislature had authorized it to issue bonds and to acquire a water works system of its own. Under this act the city had voted an issue of bonds to buy or construct a plant. After having done this, it passed the foregoing resolution and commenced the suit referred to. This was held to present a Federal question.

In

*Pacific Electric Railway Co. vs. Los Angeles*, 194 U. S., 117,

the facts were as follows:

The law of California provided that these rights should be sold at auction. The appellant having applied to the city for a street railway right, the sale was had and the bid of E. Murray being the highest, it was ordered that the right be sold to him, and the city treasurer was directed to receive the money to be paid during the twenty-four hours expiring at 3:15 p. m., February 11, 1902. On that date the council declared the bid of Murray to be fraudulent and again took up the matter of a sale. The appellant bid $152,000; no other bids were made; the right was ordered sold to the appellant and it paid in the money which was accepted by the city. The council passed an ordinance granting the right to the appellant which was presented to the mayor, but was returned by him without his signature or approval, and with his objections. On February 21, the matter came before the council, which did not pass the ordinance over the mayor's veto. But the council passed a resolution attempting to reject all bids and ordering the refund of the money paid by the appellant. The court sustains the jurisdiction, notwithstanding that it ultimately held that there was no valid contract, saying:

> It will be observed that rights under the Fourteenth Amendment of the Constitution of the United States were explicitly asserted. Besides the Circuit Court treated the bill also as presenting for consideration rights under the contract clause of the constitution and entertained jurisdiction of the case on the authority of *Riverside, etc., R. Co. vs. Riverside*, 118 Fed. Rep., 736.

See also in this connection

*City Railway Company vs. Citizens' Railway Company*, 166 U. S., 562.

*Walla Walla City vs. Walla Walla Water Company*, 172 U. S., 1.

In

*Iron Mountain Railroad Co. vs. Memphis*, 96 Fed., 113,

the Circuit Court of Appeals for the Sixth Circuit, speaking through Judge Taft, sustained the jurisdiction where the controversy was as to the right to maintain a railroad in a street and where the law impairing the obligation of the contract was a resolution stating that unless the railroad company should revise and adjust its rates, its failure so to do should work a forfeiture of its rights and that the city would then resume its possession and control of the premises.

In the case at bar the city, by the resolution in question, instead of threatening to resume possession and control, attempted to absolutely resume possession and control of these premises and to oust the company from the streets. Moreover, unless its contract afforded to the company protection in the case at bar, this resolution was absolutely valid and enforceable. We take but two sentences from Judge Taft's opinion. Referring to this resolution, he says:

> It impairs the obligation of a contract if it purports by force of law to authorize any one to do that which would be a breach of the contract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and right of possession in the city it authorizes the city officers peaceably to take possession of the street and to take up the tracks, and would doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them.

In

*Riverside A. Ry. Co. vs. City of Riverside, et al.*, 118 Fed., 736,

the jurisdiction was sustained where the enactment was a resolution stating the price which the city would there-

after demand under a contract which it had made to furnish a supply of electric current, and providing further that if the company so desired it would continue to supply the current pending a suit to determine the rights of the parties.

These authorities amply sustain the conclusion of the court below that there was jurisdiction. It is unnecessary for us to answer in detail the authorities which counsel cite, because they are distinguished in the cases from this court to which we have called attention, especially in the *Duluth* case.

In support of their contention counsel urge that if the appellee is entitled to have the resolution in question declared void because in violation of the Federal Constitution it is also entitled to set up and maintain a like right under the State constitution. In other words, the proposition is that the appellee is deprived of its rights under the Federal Constitution because it may assert a like right under the state law. The Federal Constitution is the supreme law of every State. Its force as a binding obligation upon the states is not increased by re-enacting it, as a part of the law of any particular State, nor can the States by recognizing and re-enacting the Federal Constitution or Federal laws, deprive the citizens of a state of the rights which the Federal Constitution guarantees to them. Substantially all of the states have a contract clause in their constitutions. Those which do not have it may adopt it. This court is not without jurisdiction on these questions, which arise under the Federal Constitution merely because like questions could be raised under the State constitutions; a state may confer an additional right, but it cannot under the cloak of seeming generosity take away a right guaranteed by the Federal Constitution.

In view of the frequency with which this court has held that resolutions are laws within the sense of the constitutional provision, it is hardly necessary to reply to the argument of counsel that this inhibition does not include all legislation in violation of the obligation of contract, but

includes only such legislation as is in the permanent form of ordinances. What determines whether the law comes within the constitutional inhibition is not the form of the law, but its effect. The effect of this resolution would be to destroy the rights of the appellee under this contract. It would destroy them just as thoroughly as an ordinance to the same effect.

Counsel say further that there is no power to amend or repeal an ordinance by a resolution. This resolution does not purport to amend or repeal an ordinance. It proceeds upon the theory that there is no ordinance and that there has been none since the first of January, 1898. The whole argument of counsel is that since that time there has been nothing here to repeal or to amend. The resolution, under the authority of code section 767, granting the city the power to authorize or forbid the construction and maintenance of street railway tracks, attempts to forbid the further exercise of the rights granted under the Turner ordinance. The code of 1897 provides (section 917) that the title to the streets is in the city in trust for the public. By section 796 cities are charged with the duty of keeping streets open and free from obstructions and nuisances. By section 696 cities are authorized to abate nuisances, and they may use the police force if necessary. By sections 1302 and 5078, any unauthorized use of the streets is indictable as a nuisance. In the attempted exercise of these powers the city passed the resolution in question. It is the law in Iowa that a private person, sustaining special damages, may maintain an action for the abatement of a nuisance and for damages.

*Elwell vs. Greenwood*, 26 Ia., 377.
*Gilchrist vs. City of Des Moines*, 128 Iowa, 49.

It is conceded by counsel that

*Merchants Union Barbed Wire Co. vs. C. R. I. & P. Ry. Co.*, 70 Ia., 105.

holds that the power to authorize or forbid street railway tracks may be exercised by resolution. It must be con-

ceded that the street railway cases in the 73d Iowa decide that the power was so exercised with reference to this particular grant.

In

*Thurston vs. Houston*, 123 Iowa, 157,

it is held that where an ordinance granted the right to occupy certain specified streets, and such streets as might thereafter be designated by the council, a designation by resolution is sufficient, even if made after a vote of the people had become necessary, as to poles and wires. It is contended by counsel that these cases are overruled by

*Cascaden vs. Waterloo*, 106 Iowa, 673.

The sole question involved in that case was whether a resolution creating a new ward in the city was valid. It involved no question as to any grant of power with reference to railroad or street railroad tracks. The *Barbed Wire Company* case is not overruled; it is held that there is a difference between a general enactment for the establishment of a ward and the grant of a right in a street.

Moreover, we submit that this entire discussion is beside the question. This resolution is not an enactment of a general or permanent nature. It is predicated upon the contention that the Turner rights expired in 1898, and is a direction that the tracks be removed. It is not intended to establish or create any permanent or semi-permanent rule of general operation. It undertakes to prohibit the continuance of a specified thing which the city claims is unauthorized and is an obstruction in the street. It is analogous to a resolution ordering the removal of a pile of dirt or a fence or any other obstruction in a public highway.

Counsel contend further that this was a mere administrative enactment, and that the city did not mean what it said by this resolution, and in support of this proposition rely upon the testimony of Mr. Brenner, the city solicitor. It should be remembered that a controversy was pending

before these resolutions were passed. *Quo warranto* suits had been brought in the State court by Fullerton and others, relators. The city was a defendant, but had not appeared. In view of this a petition was presented to the city council asking the city to co-operate with the relators in those suits (Trans., p. 361). Mr. Bremner, the city solicitor, made a report to the council upon this matter (Trans., p. 362). On November 20th, it appears (Trans., p. 364) that Mr. Whitney, a member of the council, had in his possession a resolution of which Mr. Bremner disapproved. Mr. Bremner says that "between noon of November 20th and the evening of November 21st the resolution was redrawn by me and some small changes made in the first and third paragraphs and the fourth paragraph entirely rewritten." The presumption is that this resolution means what it says.

In

*Old Colony Trust Co. vs. City of Wichita*, 123 Fed., 779,

the court said:

> What the city intended to do must be determined from the ordinance. It cannot be heard to say that it solemnly enacted an ordinance which it did not intend in good faith to enforce and in the mode and manner provided by the ordinance. The complainants had the right to act upon the theory that the city intended to do what it had solemnly declared by ordinance it would do and not to wait until the threatened wrong was done. It had the legal right to invoke the aid of the courts for protection against the wrong.

The argument of counsel is that this resolution was simply a resolution directing the city's solicitor to commence a suit or authorizing him to commence one. The complete answer to this proposition is that this is not what the resolution says. The appellee, when it read this resolution, could interpret it only as an order to tear up its tracks, with a further requirement that the city solicitor see that this was done. There is nothing in the resolution about the bringing of a

suit, and it must be assumed that the city intended to say what it did say and meant what it said. It has never repealed this resolution, nor modified it in any way.

The suggestion that a suit was to be brought to determine the rights of the company flatly contradicts the resolution which expressly and unequivocally determines and asserts that it has no rights which the city will respect.

This resolution operated to prohibit and render unlawful the extensions which the bill alleges and which the testimony shows it was necessary for the appellee to make.

Note that in the answer in which the defendant denies that it intends to interfere with the rights of the complainant, it also denies in paragraph thirty that the complainant has any rights under the ordinance that is in controversy. Note also that in paragraph 24 defendant admits that in order to successfully operate and maintain its system, the complainant will be required to make extensions, and that it expressly denies the existence of any contract authorizing this and denies the existence of any contract authorizing the operation of the existing system.

There remains the question of jurisdiction based upon the due process of law provision of the constitution. It can be presented in a nut-shell. The bill shows the existence of this right. The answer admits that this right has been at all times claimed by the company. The bill shows the passage of this resolution which says to the company unless you voluntarily destroy this property that you have acquired by virtue of this contract the city will destroy it for you. If this ordinance is valid, the unavoidable result is the taking of this property without due process of law.

The jurisdiction upon both grounds is clear.

## XII.

*There is jurisdiction in equity.*

Counsel assert that there is no jurisdiction in equity in this proceeding, predicating this assertion upon the propo-

sition that injury by judicial proceedings is not an injury justifying an injunction. A sufficient answer to counsel is that this is not the basis upon which the jurisdiction is invoked. This resolution is a cloud upon the complainant's title. Resort to equity is necessary to avoid a multiplicity of suits. There are extensions which the company desires to build, which it cannot build in view of the city's attitude. That these extensions are necessary is admitted in the answer, and that this necessity arises not only on account of the obligations of the company to the public, but also in order to preserve its plant, is obvious and is conceded. It is equally clear that the damages incidental to a refusal to permit extensions could never be ascertained in an action at law.

We quote from

*Blair vs. Chicago*, 201 U. S., 448,

as follows:

> As to the conspiracy to get the case into the Federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justifiable demand from seeking the Federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and requisite diversity of citizenship confers jurisdiction upon the Federal courts, and in such cases the motive of the creditor in seeking the Federal jurisdiction is immaterial (*South Dakota vs. North Carolina*, 192 U. S., 286, 310; *Dickerman vs. Northern Trust Co.*, 176 U. S., 181, 190; *Lehigh Mining & Manufacturing Company vs. Kelly*, 160 U. S., 327, 336; *Crawford vs. Neal*, 144 U. S., 585; *Cheever vs. Wilson*, 9 Wall., 108, 123; *Smith vs. Kernochen*, 7 How., 198, 216). * * * While it may be that there would have been no interference on the part of the city with the property while it was in the hands of the court's receivers, still the record shows that the city strenuously contested

> the asserted rights of the corporation to the franchise to use the streets of the city for ninety-nine years, the term claimed to have been granted to them by the act of February, 1865. It was the claim of the city that as to many of the ordinances granting rights in a number of the streets, the right to the use and occupancy of them would expire July 30, 1903. The city had asserted in a number of ways its purpose to treat the rights of the companies and whatever franchises they had as terminated at that date. It declared its purpose to resume possession of the streets and resort to all legal means to protect its rights against what were deemed the unfounded claims of the companies as to the extended franchises. Without going into further detail upon this branch of the case, we think that the attitude and claims of the city cast a cloud upon the title to this property which was in the hands of the receivers to be administered under the orders of the court, and that in such case the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of the claims of the parties which cast a cloud upon the franchises, and rights claimed by the company and the receivers, and that in such case it was proper to grant an injunction until the rights of the parties could be determined (*Detroit vs. Detroit Citizens' Street Railway Co.*, 184 U. S., 368; *In re Tyler*, 149 U. S., 164; *Rouse vs. Letcher*, 156 U. S., 47; *White vs. Ewing*, 159 U. S., 36). We think, then, that the court had jurisdiction of the case made in the ancillary bills.

Upon this question see also

> *Detroit vs. Detroit Citizens' Railroad Company*, 184 U. S., 368,

where it is said in response to the contention that the remedy at law is adequate:

> The averments in the complainant's bill upon this subject, which are set forth in the above statement of facts, show the additional and special grounds upon

which the jurisdiction in equity is invoked. Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of non-payment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.

The roads operated by complainant are also indebted to an extent of over eight million dollars, secured by mortgages upon the railways, their franchises, rights and privileges, together with the tolls and fares, earnings and profits arising therefrom, and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned; such belief being based upon the existence and terms of such ordinances.

The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinances of 1899. The immediate enforce-

ment of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation.

We also make the following excerpt from

*Cleveland vs. Cleveland City Railway Co.*, 194 U. S., 531:

> Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion, risks and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity. This conclusion is, we think, besides inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily, would have engendered the enforcement of two rates of fare over the same line, leading to consequences dangerous to the public interest, peace and tranquillity, the extent of which it would be difficult in advance to perceive. And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in *Detroit vs. Detroit Citizens' Street Railway Co.*, 184 U. S., 368:

On this question also see

*Vicksburg Water Works Co. vs. Vicksburg, supra,*

where the court says:

> It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that

> mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries, which, if inflicted, would be wholly destructive of his rights.

Again in the *Memphis* case Judge Taft says (page 131):

> If this resolution violates the Federal Constitution there can be no doubt that complainant is entitled to equitable relief. It is certainly a cloud upon the title of the railroad company in its occupancy of the street which it may ask a court of equity to remove and to enjoin any claim under it.

The same claim was made in

*Omaha Water Co. vs. City of Omaha*, 147 Fed., 1.

Judge Sanborn wrote the opinion, and there held that an order by a water board fixing rates contrary to the provisions of the ordinance was a violation of the contract, and that this gave the court jurisdiction. The court says:

> Any reduction of those rates, any inhibition of agreements between the company and its consumers upon any rates not exceeding those there specified, necessarily deprives the company of that freedom to contract with its consumers and to collect from them which the city covenanted by this clause of the contract that it should enjoy.
>
> Any reduction of these rates necessarily impairs the obligation of this contract because it deprives the water company of the full benefit of the term of the contract which was most important and beneficial

to it. The order of the water board which purported to reduce the rates was made pursuant to a law of the State and it was therefore violative of section 10, article I, of the constitution and the bill states a good cause of action for an injunction to prevent its execution.

The city denies the complainant's right to make extensions. This resolution is a cloud upon the complainant's title. There are involved a multiplicity of public and private rights.

Counsel also urge that there is no jurisdiction in equity because they contend that the complainant secured the passage of the resolution of which complaint is made. This contention is absolutely without the support of any competent or incompetent evidence.

Reference is made to the testimony of Mr. Bremner on pages 366, 367 and 368. We have elsewhere referred to the testimony of Mr. Bremner, that he received this resolution from Mr. Whitney, a member of the council, and that he, Mr. Bremner, made radical changes in it. It is true the city solicitor testified that his understanding was that the original resolution—not the resolution that the council passed—was either prepared by the attorneys for the company or at their instance. This was objected to as incompetent and a motion was made to strike it out in view of the fact that Mr. Bremner had stated, in answer to interrogatory 15, page 366, that he had no personal knowledge on this question. This testimony was clearly incompetent and no effort was made to call any witnesses who had any personal knowledge with reference to the matter. Moreover, if competent, this evidence would only warrant the inference that the company had unsuccessfully attempted to tone down the city's action. It cannot be presumed that the company was actively aiding an effort to destroy it.

On page 367 Mr. Bremner states the substance of his conversation with Mr. Alberson. It does not appear that Mr.

Alberson had any authority to represent the company in this matter. It does not appear that Mr. Alberson, in any way, directly or indirectly, requested the passage of the resolution that was passed. On the contrary, he evidently desired something else which Mr. Brenner refused. He was also interested in the length of time which the company was to have to remove its tracks, which is hardly consistent with the theory that it was not understood that the resolution had anything to do with the removal of the tracks. Mr. Brenner nowhere claims that he even understood that the resolution that was passed emanated from the company.

As a matter of fact, the controversy was on. The answer shows that the city intended this resolution to constitute an affirmative movement in its attack on the company. Mr. Brenner states that he preferred the other forum. He says that the complainant preferred this forum. Neither is to be criticised for having a preference.

The attitude of the parties was hostile. Under these or any other circumstances complainant had the right to be interested in the form of this resolution. Both parties were of necessity interested in the matter. The fact that Mr. Brenner, representing the city, insisted upon drafting this resolution himself and refused to permit the passage of the resolution which he says he understood the company preferred, is only material as indicating an absence of any collusion.

We have printed, as an appendix to this brief, an opinion given by Judge Dillon upon the proper construction of this Turner ordinance, which clearly and concisely summarizes the considerations which lead to the conclusion that the grant made by the ordinance is without limit as to time.

We respectfully submit that the case should be affirmed.

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